157-548

157-348

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 212.

THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. H. SHANE.

IN ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

FILED JULY 6, 1891.

(14,723.)

(14,723.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 212.

THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. H. SHANE.

IN ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

INDEX.

	Original.	Print.
Writ of error	1	1
Caption	4	1
Complaint	5	2
Summons	7	3
Marshal's return	8	4
Orders filing motion to quash summons, &c.	9	4
Motion to quash summons	10	5
Order continuing motion	10	5
Order overruling motion to quash, &c.	11	6
Bill of exceptions on motion to quash	12	6
Motion to quash	12	7
Summons	13	7
Order overruling motion	15	8
Judge's certificate	15	8
Order filing motion for security for costs and demurrer	16	9
Motion for security for costs	16	9
Demurrer to complaint	17	9
Order filing affidavit in opposition to motion for security	18	10
Affidavit of J. H. Shane	19	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 14, 1894.

	Original.	Print.
Order sustaining motion for security for costs, &c.	19	11
Order on demurrer	20	11
Order filing affidavits as to security for costs	20	11
Affidavit of J. W. Simmons	20	11
Mrs. Mary Jane Edwards	21	12
Sam. A. Brown	22	12
G. W. Edwards	23	13
Order overruling motion for security for costs	24	13
Order filing amended complaint	24	13
Amended complaint	25	14
Order filing second amended complaint	27	16
Second amended complaint	27	16
Answer to amended complaint	29	17
Order beginning trial	30½	19
Order continuing trial	31	19
Judgment	31	19
Order filing motion for new trial	32	20
Motion for new trial	32	20
Order overruling motion for new trial	33	20
Order filing motion in arrest of judgment	34	21
Motion in arrest of judgment	34	21
Order overruling motion in arrest of judgment	34	22
Order as to bill of exceptions, writ of error, &c.	35	22
Order filing bill of exceptions	35	22
Bill of exceptions	36	22
Statement of proceedings	36	22
Testimony of E. N. Carter	37	24
Lum Johnson	40	27
J. H. Shane	41	27
T. J. Star	51	35
James Pettyjohn	54	37
J. C. Murphy	55	38
J. H. Shane (recalled)	64	44
Defendant's requests to charge	65	44
Charge of the court	70	48
Motion for new trial	81	56
Motion in arrest of judgment	82	57
Judge's certificate	83	57
Assignment of errors	85	58
Order filing writ of error, &c.	102	68
Writ of error (copy)	103	68
Citation (copy)	104	69
Bond	105	70
Writ of error (copy)	107	71
Citation (copy)	109	72
Order enlarging time to file record	110	72
Clerk's certificate	112	73
Citation (original)	114	73
Bond	116	74

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the United States court in the Indian Territory in and for the third judicial division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in cause number 109, which is in the said United States court in the Indian Territory, before you, between J. H. Shane, as plaintiff, and The Gulf, Colorado and Santa Fé Railway Company, as defendant, a manifest error hath happened, to the great damage of the said Gulf, Colorado and Santa Fé Railway Company, as by its complaint appears, we, being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in said Supreme Court of the United States, at Washington, within thirty days from this date, that, the record and proceedings being inspected, said Supreme Court of the United States may cause further to be done therein to correct that error what of right and in accordance with the law and customs of the United States should be done.

2 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 5 day of June, A. D. 1891.

[Seal United States Court in the Indian Territory, Third Division.]

W. NELSON,
Clerk of the United States Court in the Indian Territory.

Allowed by—
JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

3 [Endorsed:] R. W. J. H. Shane, pla., *vs.* G., C. & S. F. Writ of error. Filed Jun 5, 1891. Wm. Nelson, clerk.

4 UNITED STATES OF AMERICA, }
Indian Territory, Third Judicial Division, } *ss:*

Pleas in the United States court in the Indian Territory for the third judicial division, held at the court-house, in the town of Ardmore, in the division aforesaid, before the Honorable James M. Shackelford, judge of said court, begun and held on the 3rd day of March, A. D. 1891, the same being the regular March, A. D. 1891, term of said court.

—— ——, *Clerk.*

In the United States Court in the Indian Territory, Third Judicial Division.

J. H. SHANE, Plaintiff,
against
THE GULF, COLORADO & SANTA FÉ RAILWAY COMPANY, Defendant.

Be it remembered that on the 22d day of September, 1890, there was filed in the office of the clerk of said court a complaint in the above-entitled cause; which said complaint is in words and figures as follows, to wit:

In the United States Court for the Indian Territory, Judicial Division No. 3.

J. H. SHANE, Plaintiff,
vs.
GULF, COLORADO AND SANTA FÉ RAILROAD COMPANY, Defendant.
Complaint at Law.

The plaintiff, J. H. Shane, complaining of The Gulf, Colorado and Santa Fé Railroad Company, defendant, represents that he is a white man and a resident of the Chickasaw nation, Indian Territory, and that the defendant is a corporation created under and by virtue of the laws of the State of Texas and being invested and impowered with the right of locating, constructing, owning, and equipping, operating, using, and maintaining a railway line through the Indian Territory by an act of the Congress of the United States; that defendant is using, maintaining, and operating a line of railroad in and through the Chickasaw nation, Indian Territory, from Red river to Purcell; that defendant has an office and an agent at Ardmore, in said Chickasaw nation.

First. Complainant alleges and charges that on the 11th day of July, 1890, he was a passenger on defendant's railroad on his journey from Ardmore, Indian Territory, to Gainesville, Texas; that after plaintiff had purchased a ticket and entered upon defendant's train as a passenger and said train put in motion by the agents and servants of defendant the conductor in charge of said train ordered and urged plaintiff to get off said train and commanded him to get on said train in another place; that in obedience to the command of defendant's conductor and relying on the judgement of said conductor in making the order, plaintiff, without fault
6 or negligence on the part of plaintiff, got off the train; that by reason of the darkness of the night and the gross negligence of the defendant- in failing to light up their platform, and by reason of the gross negligence of defendants in not stopping their train, and the negligent construction of defendants' platform at Ardmore, in said Chickasaw nation, in this: said platform is constructed about fifteen inches higher than the level of the road bed of said defendant, and that it left a space of about 18 inches between the curbing of said platform and the rail of defendants'

track; that by reason of the darkness of the night, the moving of said train, and the failure to construct and light said platform, as above stated, plaintiff, without fault on his part in getting off said train, as directed and urged by said conductor, stepped off said platform and was knocked down and run over by defendants' train; that defendants' cars ran upon and over plaintiff's left foot and leg, crushing the bones and flesh of plaintiff's leg, causing amputation between the ankle and knee joints, to plaintiff's damage fifteen thousand dollars.

Second. Plaintiff alleges that by reason of defendant's negligence in crushing and amputating defendant's leg, as above stated, plaintiff suffered great pain to his damage five thousand dollars.

Third. Plaintiff alleges that after defendant had negligently crushed his foot and leg, as above alleged, it negligently amputated his leg in such a manner as to make a second amputation necessary, causing great pain, to plaintiff's damage five thousand dollars.

Fourth. Plaintiff further alleges that he has been at great expense for medical treatment, $500; board, $100, and loss of crop, $500.

7 Wherefore plaintiff prays that defendant be cited to answer this complaint, and that he have judgment for his damage, cost, and for general relief.

his
J. H. x SHANE.
mark.

J. S. JENKINS,
Att'y for Plaintiff.

Before me personally appeared J. S. Jenkins, attorney for J. H. Shane, plaintiff, and says that he believes the above allegations to be true, and that the plaintiff is physically unable to attend before the clerk for the purposes of making affidavit.

J. S. JENKINS,
Attorney for J. H. Shane, Plaintiff.

Subscribed and sworn to before — this 24th day of September, A. D. 1890.

[SEAL.] A. D. MATTHEWS,
Notary Public.

Subscribed and sworn to before me — 23rd day of March, 1891, by J. H. Shane.

A. D. MATTHEWS,
Notary Public.

Endorsed: "No. 109. J. H. Shane *vs.* Gulf, Colorado & Santa Fé R. R. Original petition. Filed Sep. 22, 1890. Wm. Nelson, clerk."

Afterwards, to wit, on the 23d day of September, 1890, a writ of summons was issued on said complaint; which said writ of summons is in words & figures as follows, to wit:

UNITED STATES OF AMERICA, }
Indian Territory, Third Judicial Division. }

The President of the United States of America to the marshal for the Indian Territory:

You are commanded to summons Gulf, Colorado & Santa Fé Railroad Company to answer, on the first day of the next October term of the United States court in the Indian Territory, third judicial division, at Ardmore, being the 7th day of October, A. D. 1890, a
8 complaint filed against them in said court by J. H. Shane, and warn them that upon their failure to answer the complaint will be taken for confessed, and you will make due return of the summons on the first day of the next October term of said court.

Witness the Honorable James M. Shackelford, judge of said court, and the seal thereof, at Ardmore, Indian Territory, this 23rd day of September, A. D. 1890.

WM. NELSON, *Clerk*,
[SEAL.] By A. D. MATTHEWS, *Deputy*.

Marshal's Return.

UNITED STATES OF AMERICA, } *ss:*
Indian Territory, — Judicial Division, }

I received this summons this 23 day of September, 1890, at — o'clock — m., and served the same by copy as follows:

Personally on J. O. Mealy, ag't, at Ardmore, Ind. Ter., this 23 day of Sept., 1890, 3 p. m.

T. B. NEEDLES,
U. S. Marshal,
By BISSELL THOMAS, *Deputy*.

Endorsed: "Docketed. Original. No. 109. Summons. J. H. Shane *vs.* Gulf, Colorado & Santa Fé R. R. Summons issued the 23rd day of September, 1890. Returnable October term, 1890. Returned and filed Sep. 23, 1890. Wm. Nelson, clerk. Marshal fees: Service, 2.00. J. S. Jenkins, attorney for plaintiff. Fees deposited."

9 THE UNITED STATES OF AMERICA, }
United States Court, Indian Territory, } *ss:*
Third Judicial Division, }

At a stated term of the United States court in the Indian Territory, third judicial division, begun and had in the court-rooms, at Ardmore, in the Indian Territory, on the 7th day of October, being the 7th day of that month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred*th* and fifteenth.

Present: The Hon. James M. Shackelford, judge of said court.

On Thursday, the 8th day of October, 1890, among the proceedings had were the following, to wit:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day comes the defendant, by its attorney, and files its motion to quash summons herein.

Afterwards, on the third judicial day of said court, the same being the ninth day of October, A. D. 1890, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
GULF, COLORADO AND SANTA FÉ RAILWAY CO. } 109. Motion to Quash Summons.

On this day comes the defendant, by its attorney, for the purpose of this motion only and files its motion to quash the writ of summons herein, and pending said motion this cause is continued to the next term. Said motion is in words and figures as follows, to wit:

10 "In the U. S. Court in the Indian Territory, October Term, 1890, 3rd Judicial Division.

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. }

And now comes the above-mentioned defendant, through its attorney, &, appearing specially and only for the purposes of this motion and for no other purpose, moves this court to quash the writ of summons issued in this cause — the following reasons, to wit:

1. Because the said writ of summons is improperly and illegally issued.

2. Because the writ of summons in this cause does not show the nature of the complaint filed herein.

3. Because no cause of action is set forth in the writ of summons issued herein.

C. L. JACKSON,
Attorney for G., C. & S. F. R'y Co."

Endorsed: "No. 109. J. H. Shane *vs.* G., C. & S. F. R'y Co. Motion to quash summons. Filed Oct. 9, 1890. Wm. Nelson, clerk."

And afterwards, on the — judicial day of said term of said court, the same being the 25th day of October, A. D. 1890, *and* the following further proceedings were had and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day came the parties, by their attorneys, and on their motion this cause is continued until the next term of this court.

UNITED STATES OF AMERICA, }
Indian Territory, Third Judicial Division. }

The President of the United States of America to the marshal for the Indian Territory:

You are commanded to summons Gulf, Colorado & Santa Fé Railroad Company to answer, on the first day of the next October term of the United States court in the Indian Territory, third judicial division, at Ardmore, being the 7th day of October, A. D. 1890, a
8 complaint filed against them in said court by J. H. Shane, and warn them that upon their failure to answer the complaint will be taken for confessed, and you will make due return of the summons on the first day of the next October term of said court.

Witness the Honorable James M. Shackelford, judge of said court, and the seal thereof, at Ardmore, Indian Territory, this 23rd day of September, A. D. 1890.

WM. NELSON, *Clerk*,
[SEAL.] By A. D. MATTHEWS, *Deputy*.

Marshal's Return.

UNITED STATES OF AMERICA, } *ss:*
Indian Territory, — Judicial Division, }

I received this summons this 23 day of September, 1890, at — o'clock — m., and served the same by copy as follows:

Personally on J. O. Mealy, ag't, at Ardmore, Ind. Ter., this 23 day of Sept., 1890, 3 p. m.

T. B. NEEDLES,
U. S. Marshal,
By BISSELL THOMAS, *Deputy*.

Endorsed: "Docketed. Original. No. 109. Summons. J. H. Shane *vs.* Gulf, Colorado & Santa Fé R. R. Summons issued the 23rd day of September, 1890. Returnable October term, 1890. Returned and filed Sep. 23, 1890. Wm. Nelson, clerk. Marshal fees: Service, 2.00. J. S. Jenkins, attorney for plaintiff. Fees deposited."

9 THE UNITED STATES OF AMERICA, }
United States Court, Indian Territory, } *ss:*
Third Judicial Division, }

At a stated term of the United States court in the Indian Territory, third judicial division, begun and had in the court-rooms, at Ardmore, in the Indian Territory, on the 7th day of October, being the 7th day of that month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred*th* and fifteenth.

Present: The Hon. James M. Shackelford, judge of said court.

On Thursday, the 8th day of October, 1890, among the proceedings had were the following, to wit:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day comes the defendant, by its attorney, and files its motion to quash summons herein.

Afterwards, on the third judicial day of said court, the same being the ninth day of October, A. D. 1890, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
GULF, COLORADO AND SANTA FÉ RAILWAY Co. } 109. Motion to Quash Summons.

On this day comes the defendant, by its attorney, for the purpose of this motion only and files its motion to quash the writ of summons herein, and pending said motion this cause is continued to the next term. Said motion is in words and figures as follows, to wit:

10 "In the U. S. Court in the Indian Territory, October Term, 1890, 3rd Judicial Division.

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. }

And now comes the above-mentioned defendant, through its attorney, &, appearing specially and only for the purposes of this motion and for no other purpose, moves this court to quash the writ of summons issued in this cause — the following reasons, to wit:

1. Because the said writ of summons is improperly and illegally issued.
2. Because the writ of summons in this cause does not show the nature of the complaint filed herein.
3. Because no cause of action is set forth in the writ of summons issued herein.

C. L. JACKSON,
Attorney for G., C. & S. F. R'y Co."

Endorsed: "No. 109. J. H. Shane *vs.* G., C. & S. F. R'y Co. Motion to quash summons. Filed Oct. 9, 1890. Wm. Nelson, clerk."

And afterwards, on the — judicial day of said term of said court, the same being the 25th day of October, A. D. 1890, *and* the following further proceedings were had and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day came the parties, by their attorneys, and on their motion this cause is continued until the next term of this court.

11 THE UNITED STATES OF AMERICA, *United States Court, Indian Territory, Third Judicial Division,* } ss:

At a stated term of the United States court in the Indian Territory, third judicial division, begun and had in the court-rooms, at Ardmore, in the Indian Territory, on the 3rd day of March, being the third day of that month, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and fifteenth.

Present: The Hon. James M. Shackelford, judge of said court.

On the 18th day of March, 1891, among the proceedings had were the following, to wit:

J. H. SHANE *vs.* G., C. & S. F. R'Y CO. } 109.

Now, at this day, come the parties hereto, by their respective attorneys, and the motion to quash the writ of summons heretofore filed herein is now taken up for hearing, and the court, having seen and heard the same and the evidence thereon and being fully advised in the premises, doth overrule said motion; to which action of the court in overruling said motion defendants then and there at the time duly excepted, and defendant now presents and tenders its bill of exceptions on said motion to quash said writ of summons, and prays that said bill of exceptions be now allowed, signed, sealed, filed, and made a part of the record in this cause, which is now accordingly done; which said bill of exceptions is in words and figures as follows:

12 UNITED STATES OF AMERICA, *Indian Territory, Third Judicial Division,* } ss:

In the United States Court in the Indian Territory for the Third Judicial Division, March Term, A. D. 1891.

J. H. SHANE, Plaintiff, *against* THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY, Defendant. } No. 109. Bill of Exceptions on Motion to Quash Writ of Summons.

Be it r-membered that at the regular A. D. 1890 term of the United States court in the Indian Territory for the third judicial division, begun and held on the 7th day of October, A. D. 1890, at the court-house, in the town of Ardmore, in the Chickasaw nation, in the third judicial division, in the Indian Territory, the following, among other, proceedings were had, to wit:

On the 9th day of October, 1890, the defendant appeared specially and only for the purpose of filing a motion to quash the writ of summons issued in this cause on the 23rd day of September, 1890, and filed said motion; which said motion is in words and figures as follows:

In the United States Court for the Indian Territory, October Term, 1890.

J. H. SHANE, Plaintiff,
against
THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY.

And now comes the above-mentioned defendant, through its attorney, specially and only for the purpose of this motion, — moves the court to quash the writ of summons issued in this cause
13 on the 23 day of Sept., 1890, for the following reasons, to wit:

First. Because the said writ of summons is improperly and illegally issued.

Second. Because the writ of summons in this cause does not show the nature of the complaint filed herein.

Third. Because no cause of action is set out in the writ of summons issued herein.

(Signed) C. L. JACKSON,
Attorney for The G., C. & S. F. R'y Co.

And be it further remembered that, said motion not having been disposed of and no ruling of the court having been made thereupon during the said regular October, 1890, term of the United States court in the Indian Territory for the third judicial division, and said cause having been continued upon said motion to the regular March, A. D. 1891, term of the said United States court in the Indian Territory for the third judicial division, which said regular March term of said court was begun and held on the 3rd day of March, A. D. 1891, and which said motion was during the said regular March term of said court and on the 18th day of March, A. D. 1891, taken up for hearing, and all parties being present, by their respective attorneys, and ready for a hearing of said motion, the defendant introduced in evidence the writ of summons in this cause issued on the 23rd day of September, A. D. 1890; which said writ of summons is in words and figures as follows:

UNITED STATES OF AMERICA, } ss:
Indian Territory, Third Judicial Division,

The President of the United States to the marshal of the Indian Territory:

14 You are hereby commanded to summons the Gulf, Colorado and Santa Fé Railway Company to answer, on the first day of the next October term of the United States court in the Indian Territory, third judicial division, at Ardmore, being the 7th day of October, 1890, a complaint filed against them in said court by J. H. Shane, and warn them that upon their failure to answer the complaint will be taken for confessed, and you will make due return of the summons on the first day of the next October term of the said court.

Witness the Honorable James M. Shackelford, judge of
[SEAL.] said court, and the seal thereof, at Ardmore, Indian Territory, the 23rd day of September, A. D. 1890.

(Signed) WILLIAM NELSON, *Clerk*,
By A. D. MATTHEWS, *Deputy*.

And there was no other or further testimony offered by either party in support of or against the said motion, and the court, being fully advised in the premises, overruled the motion; to which action of the court in overruling the said motion defendant then and there duly excepted, and at which time the court made the following entry of record:

THE UNITED STATES OF AMERICA, }
United States Court, Indian Territory, } *ss:*
Third Judicial Division, }

At a stated term of the United States court in the Indian Territory, third judicial division, begun and had in the court-rooms, at Ardmore, in the Indian Territory, on the third day of March, being the third day of that month, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of
15 the United States of America the one hundred and fifteenth.

Present: The Hon. James M. Shackelford, judge of said court.

On the eighteenth day of March, 1891, among the proceedings had were the following, to wit:

J. H. SHANE }
vs. } 109.
G., C. & S. F. R'Y CO. }

Now, at this day, came the parties hereto, by their respective attorneys, and the motion to quash the writ of summons heretofore filed herein is now taken up for hearing, and the court, having seen and heard the same and the evidence thereon and being fully advised in the premises, doth overrule said motion; to which action of the court in overruling said motion defendants then and there at the time duly excepted, and defendant now presents and tenders its bill of exceptions on said motion to quash said writ of summons, and prays that said bill of exceptions be now allowed, signed, sealed, filed, and made a part of the record in this cause, which is now accordingly done.

And now comes the said defendant in open court at this present March, A. D. 1891, term and presents and tenders this its bill of exceptions, and prays that the same be allowed, signed and sealed, and made a part of the record in this cause, which is now accordingly done.

In witness whereof I, the undersigned, judge of the United States

court in the Indian Territory, this 18th day of March, A. D.
16 1891, set my hand and affixed my seal in open court during the March, A. D. 1891, term of said court.

JAMES M. SHACKELFORD, [SEAL.]
Judge of the United States Court in the Indian Territory.

Afterwards, on the 16th judicial day of said term, the same being the 20th day of March, A. D. 1891, the following further proceedings were had in said cause and entered of record:

J. H. SHANE
vs.
THE GULF, COLORADO & SANTA FÉ RAILWAY CO. } 109.

On this day comes the defendant, by its attorney, and files its motion for security for costs and its demurrer to plaintiff's complaint; which said motion for security for costs is in words and figures as follows:

UNITED STATES OF AMERICA, }
Indian Territory, Third Judicial Division, } *ss:*

In the United States Court in the Indian Territory, Third Judicial Division, March Term, A. D. 1891.

J. A. SHANE, Plaintiff,
vs.
THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY, a Corporation, Defendant. } No. 109. Motion for Security for Costs.

17 Now comes the defendant and moves the court to require the plaintiff to file herein a bond for costs.

S. E. JACKSON AND
C. L. JACKSON,
Attorneys for Defendant.

Endorsed: "No. 109. United States court in the Indian Territory, third judicial division. J. H. Shane *vs.* Gulf, Colorado and Santa Fé Railway Company. Motion for security for costs. Filed in open court this 20th day of March, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy. S. E. Jackson and C. L. Jackson, attorneys for defendant."

And said demurrer to complaint is in words and figures as follows:

"INDIAN TERRITORY, *Third Judicial Division,* } *ss:*

In the United States Court in the Indian Territory for the Third Judicial Division, March Term, A. D. 1891.

J. H. SHANE, Plaintiff,
against
THE GULF, COLORADO AND SANTA FÉ Railway Company, a Corporation, Defendant.
} No. 109. Demurrer to Complaint.

18

Now comes the defendant and, still most respectfully asserting that it has not been served with process or writ of summons in this cause and still saving to itself all exceptions to the ruling of the court heretofore in this cause on defendant's motion to quash the writ of summons and in no way waiving the question of said defective writ of summons and still most respectfully asserting that the court has not properly acquired jurisdiction over it in this cause, demurs to plaintiff's complaint herein and for cause of demurrer says:

First. That the court has no jurisdiction of the subject of this action.

Second. That the complaint does not state facts sufficient to constitute a cause of action.

S. E. JACKSON AND
C. L. JACKSON,
Attorneys for Defendant."

Afterwards, on the 18th judicial day of said term of said court, the same being the 23rd day of March, A. D. 1891, the following further proceedings were had in said cause and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y CO.
} 109.

On this day comes the plaintiff, by his attorney, and files affidavit- controverting motion for security for costs; which affidavits are in words and figures as follows:

"In the United States Court for Indian Territory, Third Judicial Division.

19

J. H. SHANE, Pl'ff,
vs.
GULF, COLORADO & SANTA FÉ R. R.

Affidavit Controverting Motion for Costs.

Now comes the plaintiff and controverts defendant's motion for cost and states the facts to be that he is a farmer and at the date of the injuries sued for he resided in the Chickasaw nation, as alleged;

that after he was able to travel he took his wife and babies and went to his father's, in the State of Ark.; that he has been at his father's since that time about six months; plaintiff still claims the Chickasaw nation as his home; that when he left for Arkansas he left with the intention of coming back as soon as he was able, and he says that he intends to make this country his home.

Plaintiff says that by reason of his injuries he has had to spend all his property, and that he is now unable to pay the cost of this suit or give security therefor.

J. H. SHANE."

Endorsed: "Filed in open court this 23rd day of March, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy."

The defendant, by its attorney, files affidavit in support of motion. The court sustains motion for security for costs, and leave is given plaintiff to file petition and to prosecute as a poor person.

20 Afterwards, on the 19th judicial day of said term of said court, the same being the 24th day of March, A. D. 1891, the following further proceedings were had and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day came on to be heard defendant's demurrer to the complaint herein, and the same being considered by the court is overruled as to the first paragraph — as to third paragraph in said complaint; whereupon leave is given plaintiff to amend complaint.

Afterwards, on the 21st judicial day of said term of said court, the same being the 26th day of March, A. D. 1891, the following further proceedings were had in said cause and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day comes the plaintiff, by his attorney, and files counter-affidavits to motion for security for costs; which affidavits are in words and figures as follows:

"In the United States Court for the Indian Territory, Third Judicial Division.

J. H. SHANE, Pl'ff,
vs.
G., C. & S. F. R. R., Def't.

Affidavit of J. W. Simmons.

Before me, the undersigned authority, on this day personally appeared J. W. Simmons, who, after being duly sworn, says that he has known the plaintiff, J. H. Shane, for nine years; that said

21 Shane has lived in the Indian Territory seven years of the time since I knew him; that all that time said Shane has been a quiet, peaceable, hard-working man; that he has never been in any trouble of any kind; that he is a sober man; that during all that time he has not been accused of selling whiskey or having anything to do with whiskey; that during all the time I knew him I have never seen him take a drink of whiskey. Said Shane is a farmer; he was farming in about three-quarters of a mile of me when the injury herein sued for was done. At that time he was living on a farm near me; that he left the Chickasaw nation in September, 1890, to go to his father's, in the State of Arkansas, on a visit; that at the time of leaving here he stated he would be back; that said Shane left a portion of his household goods at my house, about 22 miles west from Ardmore; that said household goods are at my house now; that said Shane left his hogs and chickens on the place where he lived, and that they are still there on the same place.

J. W. SIMMONS.

Subscribed and sworn to before me this 25th day of March, A. D. 1891.

A. D. MATTHEWS,
Notary Public."

Endorsed: "Filed in open court this 26th day of March, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy."

"In the United States Court, 3rd Judicial Division, Indian Territory.

J. H. SHANE
vs.
G., C. & S. F. R'Y.

22 Mrs. Mary Jane Edwards, being of lawful age, first being sworn, upon her oath says: I have known Mr. J. H. Shane about nine years, and that he has been living in the Indian Territory about six or seven years; that in September last, 1890, he left here to go on a visit to his father's, in Ark., so that he might be cared for until his leg could get well, which he lost in the injury sued for in this case; that when he left he said he would return as soon as he could, and is now residing near Woodford, in the Chickasaw nation. I have always known Mr. Shane to be a sober, law-abiding man and have never known him to be charged with any violation of law; that when he, Shane, left here on the visit as stated above he left a greater part of his effects at Mr. Simmons' house, near Woodford—all his hogs and chickens.

her
MARY JANE x EDWARDS.
mark.

Subscribed and sworn to before me this 25th day of March, 1891.
A. D. MATTHEWS,
Notary Public."

Endorsed: "Filed in open court this 26th day of March, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy."

"In United States Court, Indian Territory, Third Judicial Division.

J. H. SHANE
vs.
G., C. & S. F. R'Y Co.

Sam. A. Brown, of lawful age, first being duly sworn, upon his oath states that he has known J. H. Shane since June, 1890, and has never known him to be charged with any violation of the law; that he, affiant, has always known said Shane to be a hard-working and law-abiding man; that when affiant subpœaned said Shane as a witness before the United States court for the eastern district of Texas in a whiskey case, as referred to in a former affidavit in this case made by affiant, affiant fully examined said whiskey case at the time as a deputy United States marshal, and that said examination showed that the said J. H. Shane had nothing to do
23 with the case in a criminal way and was never so charged.

Affiant says that in a former affidavit made by him in this case affiant stated that J. H. Shane, he believed, was a non-citizen of the Chickasaw nation; that the affiant intended to state that the said Shane was not an Indian; that Shane, he believed, had moved to Arkansas; that the only information affiant had upon the subject was that Shane had gone to Arkansas, but had left his effects at his home in the Chickasaw nation.

SAM. A. BROWN.

Subscribed and sworn to before me this 25th day of March, 1891.
A. D. MATTHEWS,
Notary Public. [SEAL.]"

Endorsed: "Filed in open court this 26th day of March, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy."

"In United States Court, Third Judicial Division, Indian Territory.

J. H. SHANE
vs.
G., C. & S. F. R'Y.

G. W. Edwards, of lawful age, being duly sworn, upon his oath says that he has known J. H. Shane, *def't* in this case, about nine years, and that the said Shane has lived in the Indian Territory for the last six years and is now living at Woodford, in the Chickasaw nation; that in Sept. last the said Shane went to Ark. on a visit to his father, and stated when he left that he would be back as soon as he could. The said Shane, when he left for the visit as stated, left

his household effects at the house of Mr. Simmons, where hy lived, in the Chickasaw nation; also his hogs and chickens. I have
24 always, since I have known the said Shane, known him to be a sober, hard-working man. I have never known him to be charged with any violation of the law.

his
G. W. x EDWARDS.
mark.

Subscribed and sworn to before me this 25th day of March, 1891.

A. D. MATTHEWS,
Notary Public."

Endorsed: "Filed in open court this 26th day of March, 1891. Wm. Nelson, clerk, by A. D. Matthews, notary public."

Afterwards, on the 21st judicial day of said term of said court, the same being the 26th day of March, A. D. 1891, the following further proceedings were had and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day, the motion for security for costs coming on to be heard, *and* the court, being sufficiently advised, doth overrule the same.

Afterwards and on the 25th judicial day of the term of said court, the same being the 6th day of April, A. D. 1891, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day comes the plaintiff, by his attorney, and files his amended complaint herein; which said amended complaint is in words and figures as follows:

25 In the United States Court for the Indian Territory, Third Judicial Division.

J. H. SHANE, Plaintiff,
vs.
GULF, COLORADO AND SANTA FÉ RAILROAD Co., Def'ts. }

Amended Complaint at Law.

Now, at this term of the court, comes the plaintiff, J. H. Shane, and, leave of the court being granted, files this his first amended complaint in lieu of his complaint filed herein on the 22nd day of September, 1890, and for such amendment says: Plaintiff, J. H.

the injuries

Shane, complainting of The Gulf, Colorado and Santa Fé Railway Co., defendant, represents that he is a white man and a resident of the Chickasaw nation, Indian Territory, and that defendant is a corporation created under and by virtue of the laws of the State of Texas and being invested and empowered with the right of locating, constructing, owning and equipping, operating, using, and maintaining a railway line through the Indian Territory by an act of Congress of the United States; that defendant is using, maintaining, and operating a line of railway in and through the Chickasaw nation, Indian Territory, from Red River to Purcell; that defendant has an office and an agent at the town of Ardmore, in said Chickasaw nation.

First. Complainant alleges and charges that on the 11th day of July, 1890, he was a passenger on defendant's railroad on his journey from Ardmore, Indian Territory, to Gainesville, Texas; that after plaintiff had purchased a ticket and entered upon defendant's train as a passenger and said train put in motion by the agents and servants of defendants the conductor in charge of said train, knowing that plaintiff had a ticket, ordered and urged plaintiff
26 to get off said train and commanded him to get on said train in another place; that in obedience to the command of defendant's conductor, and relying on the judgement of said conductor in making said order, plaintiff complied with the order of said conductor and got off said train; that by reason of the darkness of the night and the gross negligence of the defendant in failing to light up their platform, as it was their duty to do, and by reason of the gross negligence of defendant in not stopping their said train, and by reason of the negligent construction of defendants' said platform at Ardmore, in said Chickasaw nation, in this: said platform is constructed about fifteen inches higher than the level of defendant's road-bed, and that it left a space of about 18 inches between the curbing of said platform and the rail of defendant's track; that by reason of the darkness of the night, the moving of said train, and the failure to construct and light said platform, as above stated, plaintiff, without fault or negligence on his part, in getting off said train, as directed and urged by said conductor, stepped off said platform and was knocked down and run over by defendant's train; that defendant's cars ran upon and over plaintiff's left foot and leg, crushing the bones and flesh of plaintiff's leg, rendering him a cripple for life by depriving him of one of his feet, to his permanent damage in the sum of fifteen thousand dollars.

Plaintiff alleges that he is a farmer by occupation, and that by reason of said injury, as above alleged, he is permanently disabled to follow his occupation.

Plaintiff alleges and charges that by reason of the said crushing of the bones and flesh of his leg, as above stated, he has suffered great pain and anguish, to his damage in the sum of five thousand dollars.

27 Wherefore plaintiff prays that defendant be cited to answer the complaint, and that on final hearing he have judge-

ment for his damage and cost of suit and for all relief which — is entitled to under the law.

Endorsed: "Filed April 4, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy."

Afterwards, on the 25th judicial day of said term of said court, the same being the 6th day of April, A. D. 1891, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

On this day comes the plaintiff, by his attorney, and files his amended complaint herein; which said amended complaint is in words and figures as follows:

"In the United States Court for the Third Judicial Division of the Indian Territory.

J. H. SHANE, Plaintiff,
against
THE GULF, COLORADO & SANTE FÉ RAILROAD CO., Defendant.

The plaintiff, J. H. Shane, complains of the defendant, The Gulf, Colorado and Sante Fé Railroad Company, and alleges that he is a citizen of the United States, resident in the Chickasaw nation, and that the defendant is a railroad corporation created under the laws of the State of Texas and was the owner of a certain railroad known as the Gulf, Colorado and Sante Fé railroad, together with the track, cars, and locomotives thereto belonging, and was a common
28 carrier of passengers thereupon for hire between Ardmore, in the Chickasaw nation, and Gainesville, in the State of Texas, and that it was operating its said railroad in the Chickasaw nation by virtue of the laws of the Congress of the United States at the time hereinafter mentioned.

Plaintiff alleges that on the 11th day of July, 1890, he had purchased of the defendant's agent a ticket authorizing him to travel as a passenger on the defendant's railroad and cars from Ardmore, Indian Territory, to Gainesville, in the State of Texas, and had gone on the defendant's train as a passenger at the depot in the said town *at* Ardmore, and said train had been put in motion by the agents and servants of the defendant, when the conductor in charge of said train ordered plaintiff to get off said train and go thereon in another place; that in obedience to command of defendant's conductor, and relying on the judgement of said conductor in giving such command, the plaintiff made an effort to get off said train, and, without any fault or negligence of plaintiff and by reason of the darkness of the night and the gross negligence of the defendant in failing to light up its platform and in not stopping said train, and by reason of the gross negligence of said defendant

in constructing its said platform about fifteen inches higher than the level of the road-bed *at* said road and in leaving a space of about eighteen inches between the curbing of said platform and the rail at said defendant's track and the improper and negligent conduct of defendant's conductor in ordering the plaintiff to get off the train while in motion, plaintiff, in getting off said train as directed and commanded by said conductor, stepped off said platform and fell under and defendant's cars ran over his left foot and leg and crushed, bruised, and broke the bones thereof.

That by reason thereof the plaintiff became for a long time
28½ ill; was obliged to and actually did expend about the sum of — dollars for surgical and other treatment and attendance in attempting to cure himself; was compelled to have his leg amputated, and has thereby become a cripple and prevented for life from actively pursuing his business and was otherwise injured, to his damage in sum of twenty thousand ($20,000.00) dollars, for which and all other proper relief he prays judgement.

CAMPBELL & JENKINS & W. M. CRAVENS,
Attorneys for Plaintiff.

Sworn to and subscribed before me this — day of April, 1891.
A. D. MATTHEWS, *N. P.*"

Endorsed: "Filed in open court this 6th April, 1891. Wm. Neison, clerk, by A. D. Matthews, deputy."

29 Afterwards, on the 28th judicial day of said term of said court, the same being the 9th day of April, 1891, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

Now, on this day, come all the parties hereto, by their respective attorneys, and defendant now files *his* answer herein; which said answer is in words and figures as follows:

"The United States Court in the Indian Territory, Third Judicial Division, March Term, A. D. 1891.

J. H. SHANE, Pl'ff,
vs.
GULF, COLORADO & SANTE FÉ RAILWAY COMPANY, Def't. } No. 109. Answer to Amended Complaint.

Comes now the defendant, by its attorneys, and, still most respectfully asserting that this court has not acquired jurisdiction over the defendant, and not hereby waiving any insufficiency or defect in the writ of summons in this cause, and still saving to itself all manner of exception to the ruling of the court on the motion to quash the writ of summons in this cause, now makes answer to

plaintiff's amended complaint in this cause, and for such answer says that it has no information sufficient to form a belief as to whether plaintiff did, on the eleventh day of July, 1890, purchase a ticket of defendant's agent authorizing plaintiff to travel as a passenger on the defendant's railroad and cars from Ard-
30 more, Indian Territory, to Gainesville, in the State of Texas, and therefore denies that such is the fact, and the defendant admits that plaintiff went on defendant's train at Ardmore, I. T., at said time, but denies that plaintiff at said time went upon said train as a passenger, and denies that after said train had been put in motion by the agents and servants of the defendant the conductor in charge of said train ordered plaintiff to get off of said train and go thereon at another place, and defendant admits that said conductor, discovering said plaintiff upon said train at a place thereon commonly known as the blind baggage and where it was improper and dangerous for any person to be, ordered the plaintiff to get off the platform of said baggage express car or cars of said train above mentioned as the blind baggage, and defendant states that thereupon said plaintiff got off of said blind baggage or platform of said baggage or express car or cars, and defendant denies that, in obedience to command of defendant's conductor and relying upon the judgment of said conductor, the plaintiff, in making an effort to get off of said train or in getting off of said train, without any fault or negligence on the part of plaintiff and by reason of the darkness of the night and the gross negligence of the defendant in failing to light up its platform and in not stopping said train and by reason of the gross negligence of defendant in constructing its said platform about fifteen inches higher than the level of the road-bed of said road and in having a space of about eighteen inches between the curbing of said platform and the rail at said defendant's track, plaintiff, in getting off of said train as directed and commanded by said conductor, stepped off of said platform and fell under the cars, whereupon defendant's cars ran over his left foot and leg and crushed, bruised, and broke the bones thereof, and defendant denies that plaintiff, by reason of having his leg crushed (if he was so hurt), was for a long time ill, and in consequence thereof was obliged to and actually did expend any sum of money for surgical and other treatment for which this defendant is liable. Wherefore defendant, having fully answered, prays that it go hence without day, and that it have and recover of plaintiff in this behalf its costs laid out and expended.

S. E. JACKSON AND
C. L. JACKSON,
Attorneys for Def't."

Endorsed: "Filed in open court this 9th day of April, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy."

30½ Afterwards, on the 28th judicial day of said term of said court, the same being the 9th day of April, 1891, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

This day this cause was called for trial, when the parties appeared and announced ready for trial. Thereupon came a jury of good and lawful men, to wit, J. M. Robinson, Taylor Carter, A. J. Dougherty, Jeff. Howeth, J. T. Mulkey, T. A. Bird, E. J. Hubbard, Jim Hughs, J. G. Treat, J. W. Banks, David Cunningham, and J. W. Gardner, who were duly empaneled and sworn to try the issues between the parties and a true verdict render. Witnesses were then sworn and the trial of said cause was begun. Pending trial, the jury, under charge of the court, were permitted to separate until tomorrow morning at 9 o'clock.

31 Afterwards, on the 29th judicial day of said term of said court, the same being the 10th day of April, A. D. 1891, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

This day the trial of this cause was resumed, and, pending the trial, the hour for adjournment having arrived, the jury, under the former instructions of the court, were permitted to separate until tomorrow morning at 9 o'clock, at which time the court announced that he would charge the jury in said cause, the evidence herein having been concluded.

Afterwards, on the 30th judicial day of said term of said court, the same being the 11th day of April, A. D. 1891, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

This day, upon the sitting of the court, came the jury in this cause, and, the evidence having been adduced and heard by the jury, the court then gave the jury his instructions in said cause, and thereupon the argument in said cause was begun, and, having been concluded, the jury retired in charge of a sworn bailiff to consider of their verdict, and, after due deliberation, returned into open court the following verdict, to wit:

"In the United States Court for the Indian Territory, Third Judicial Division.

J. H. SHANE, Pl'ff,
vs.
GULF, COLORADO & SANTE FÉ RAILWAY CO., Def't.

We, the jury, upon our oaths find for the plaintiff, and
32 assess his damages in the sum of sixteen thousand ($16,000.00) dollars.

J. T. MULKEY, *Foreman.*"

It is therefore ordered, adjudged, and decreed by the court that the plaintiff, J. H. Shane, do have and recover of the defendant, The Gulf, Colorado & Sante Fé Railway Company, said sum of sixteen thousand dollars, with 6 per cent. interest thereon from date hereof, and all costs of suit, for which let execution issue.

Afterwards, on the 33rd judicial day of said term of said court, the same being the 15th day of April, A. D. 1891, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

Now, on this day, come all the parties hereto, by their respective attorneys, and defendant now files a motion for a new trial; which said motion is in words and figures as follows:

"In the United States Court in the Indian Territory, Third Judicial Division, March Term, A. D. 1891.

J. H. SHANE
vs.
GULF, COLORADO & SANTE FÉ RAILWAY COMPANY. } No. 109.

Motion for a New Trial.

Now comes the defendant in open court during the said March term, A. D. 1891, of said court, and moves the court to grant a new trial in this cause for the following reasons, to wit:

First. Because the court erred in refusing to allow the defendant challenges for cause to jurors called in this cause.

Second. Because the court erred in declining to furnish counsel in this cause with a list of eighteen competent jurors from
33 which counsel might strike the names, not exceeding three on each side, of such jurors.

Third. Because the court erred in admitting improper evidence offered by the plaintiff and objected to by the defendant.

Fourth. Because the court erred in refusing to admit proper evidence offered by the defendant.

Fifth. Because the court erred in refusing to charge the jury as to the law, as requested by the defendant.

Sixth. Because the court erred in charging the jury as to the law in this case, as requested by the plaintiff.

Seventh. Because the court erred in charging the jury as to the law in this case on his own motion.

Eighth. Because the verdict of the jury is against the evidence.

Ninth. Because the verdict of the jury is against the weight of the evidence.

Tenth. Because the verdict of the jury is against the law.

Eleventh. Because the verdict of the jury is against the law and the evidence.

S. E. JACKSON AND
C. L. JACKSON,
Attorneys for Defendant."

Endorsed: "Filed in open court this 15th day of April, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy."

And said motion now being taken up by the court and seen and heard and the court, being fully satisfied in the premises, doth overrule said motion, and defendant then and there at the time duly excepted to the action of the court in overruling said motion for a new trial.

34 Afterwards, on the same day, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y CO. } 109.

Now, at this day, come all the parties hereto, by their respective attorneys, and defendant now files a motion in arrest of judgement; which said motion is in words and figures as follows:

"In the United States Court in the Indian Territory, Third Judicial Division, March Term, 1891.

J. H. SHANE
vs.
GULF, COLORADO & SANTE FÉ RAILWAY COMPANY. } 109.

Motion in Arrest of Judgment.

Now comes the defendant in open court, during the said March term, A. D. 1891, of said court, and, after the trial of this cause, still most respectfully maintaining that defendant's demurrer to plaintiff's last-amended complaint should properly have been sustained by this honorable court, *and* now moves the court to arrest the judgment in this cause because there is no cause of action set out in plaintiff's above-mentioned complaint.

____ ____,
Attorneys for Defendant."

Endorsed: "Filed in open court this 15th day of April, 1891. Wm. Nelson, clerk, by A. D. Matthews, deputy."

And said motion in arrest of judgment being taken up by the court and seen and heard and the court, being fully advised
35 in the premises, doth overrule said motion; to which action of the court in overruling said motion defendant then and there at the time duly excepted.

Afterwards, also on the same day, the following further proceedings were had in said case and entered of record:

J. H. SHANE
vs.
G., C. & S. F. R'Y Co. } 109.

Now, at this day, come all the parties hereto, *and* by their respective attorneys, and, by consent of all parties, it is by the court ordered that the defendant have leave to file a bill of exceptions in this case within forty days from the last day of the present term of this court, and that the judgment of this court entered in this cause be stayed, and that no execution issue thereon during the said period of forty days, and that a writ of error may be then issued in this cause and, when lodged in the office of the clerk of this court, shall operate as a supersedeas as to the said judgment in this case upon proper bond being then given.

And afterwards, to wit, on the 13th day of May, 1891, in vacation, said defendant filed in the clerk's office of said court a bill of exceptions in said cause, and the following vacation entry — made on the record:

J. H. SHANE
vs.
THE GULF, COLORADO & SANTE FÉ RAILWAY CO. } 109.

Filed this 13th day of May, 1891. Signed, sealed, and allowed by James M. Shackelford, judge.

WM. NELSON, *Clerk*.
By A. D. MATTHEWS, *Deputy*.

36 Said bill of exceptions is in words and figures as follows:

In the United States Court in the Indian Territory, Third Judicial Division, March Term, A. D. 1891, Held at the Town of Ardmore in and for said Third Judicial Division.

J. H. SHANE, Plaintiff,
vs.
GULF, COLORADO & SANTE FÉ RAILWAY COMPANY, Defendant. } No. 109.

Be it remembered that the above numbered and entitled cause being called for trial at the regular March, A. D. 1891, term of the

United States court in the Indian Territory, held at Ardmore, in the third judicial division, Campbell & Jenkins & William M. Cravens, Esquires, appeared for plaintiff and Clifford L. Jackson & Solomon E. Jackson, Esquires, appeared for defendant, and the respective parties announced ready for trial.

Whereupon and before the jury was empaneled in this cause defendant's counsel requested the court to cause a list of eighteen competent and qualified jurors to be made and to furnish counsel for both parties with a copy of such list of eighteen qualified jurors from which counsel for each party might strike the name of three jurors and from which said list the twelve jurors to try this cause should be selected, and that the jury to try this cause be selected in accordance with the statutes in such cases made and provided.

The court refused to grant such request of defendant's counsel for the reason that the rule had been established by the court since its organization that the exceptions should be taken to the twelve men that might be called into the box, and to which action of the court in so refusing such request of defendant's counsel defendant then and there at the time duly excepted and still excepts.

And thereafter, amongst others, one J. S. B. Apolos was called to the jury-box to serve as a juror in this cause, and the court announced that said Apolos was a duly qualified juror to so serve in this said cause. Defendant's counsel caused it to be shown to the court that said Apolos had served as a member of the regular panel of grand jurors at the October, A. D. 1890, term of this court and within two years prior to the present term; whereupon defendant's counsel challenged said Apolos on the ground that he had served as a member of the regular panel of the grand jurors at said October, A. D. 1890, term of this court and within two years prior to the time of such challenge. The court refused to allow such challenge, at which action of the court in so refusing to allow such challenge defendant's counsel then and there at the time duly excepted and still excepts.

The jury was then sworn to try this cause.

William Pfeiffer was then sworn as stenographer in this cause.

Thereupon all the witnesses for both plaintiff and defendant were called and sworn and placed under the rule by the court.

37 Thereupon plaintiff's counsel read the complaint in this cause and made a statement of plaintiff's case to the jury, and defendant's counsel then read defendant's answer and stated defendant's case to the jury; whereupon plaintiff's counsel asked leave of the court to amend plaintiff's amended complaint by interlineation and inserting therein the words "and the improper and negligent conduct of defendant's conductor in ordering the plaintiff to get off the train while in motion."

Defendant's counsel objected to plaintiff being so permitted to amend the complaint at this stage of the trial and at this time, because plaintiff had filed one original and two amended complaints, and that in none of said complaints were there any allegations charging the conductor of said train with any negligence and especially with negligent conduct in ordering plaintiff to get off

the train; and, further, that this cause has been pending in this court for a long time, and that defendant had prepared its defence to this cause upon the allegations of the complaint, and that the amendment asked to be made by plaintiff's counsel was an allegation of new matter, foreign to the issues as now formed in this cause; which objection the court overruled, and thereupon the court permitted such amendment to be then and there made; to which action of the court in overruling such objection and permitting such amendment of the complaint defendant's counsel then and there at the time duly excepted and still except.

The court thereupon made an order allowing defendant to amend its answer by denying the above-mention- amendment of plaintiff's complaint, which amendment defendant then made.

E. N. CARTER, being then called as a witness for plaintiff and being duly sworn and placed upon the witness stand, was asked by plaintiff's counsel his name and place of residence; whereupon defendant objected to the introduction of any testimony under the complaint in this cause, because there are not sufficient facts set out in plaintiff's complaint to constitute a cause of action; which objection the court overruled, and to which action of the court in so overruling such objection defendant then and there at the time duly excepted and still excepts.

Said witness, R. N. Carter, then testified in substance as follows, to wit:

My name is R. N. Carter; I reside in Ardmore, Chickasaw nation, Indian Territory; my occupation is that of a night clerk of the Western hotel, of Ardmore, and I occupied that position during the month of July, 1890. I was acquainted with plaintiff during the month of July, 1890, and remember of seeing him (plaintiff) on the 10th day of July, 1890, for the first time, at the Western hotel. Plaintiff registered at Western hotel for a bed on the night of the 10th of July and occupied bed until 2.30 a. m. on the 11th day of July, 1890. Plaintiff was in company with an old gentleman named Jack Edwards at Western hotel, and I accompanied both of these gentlemen to the train at defendant's depot in Ardmore on the morning of the 11th day of July, 1890. They informed me that they were going to Paris, Texas, in obedience to a subpœna to testify in a whiskey case. After we got to the depot plaintiff and Jack Edwards purchased tickets from defendant's agent, saying that they were going south on train to Gainesville, Texas—from Gainesville to Paris, Texas. I remember of plaintiff receiving an injury on the morning of the 11th of July, 1890. I saw plaintiff as he fell. The train was in motion when I saw plaintiff fall. I know that to be
38 fact because I was just within a few feet of the depot waiting-room when plaintiff fell. I at that time was facing towards the south. Just as the train started from the depot at Ardmore I was standing on the depot platform, within a few feet of depot waiting-room, and heard the conductor of train call, "Get off of there

and get on here." The conductor (when he made that remark) was in the act of stepping on the train from the platform. At the time the conductor made the said remark the train was in motion and going towards the south. When the conductor made the remark I did not know to whom it was addressed, but immediately after making that remark I saw two men getting off of the train, one getting back on in a different place immediately after he alighted, and I saw the other man try to catch hold of something with his right hand on the car. I don't know whether he got off the car or not before he stumbled. He had hold of an iron rod attached to one of the cars and stumbled along with the train until he got to the end of the said depot platform, when he fell down. I could then hear the bell "jing" and heard the cord run through the pull*ies* on the train, and the train then stopped. I did not see any signs or hear any sounds before the man fell to the ground. While the plaintiff was being dragged along with the train the conductor of train was on the platform between the express and smoking cars. I did not see the conductor standing there when the plaintiff fell, but saw him (conductor) get off of the train from that point when plaintiff fell. From my position I could not see where the conductor stood, but suppose that he stood between the express and smoking cars. It was but three or four seconds after I heard the remark "Get off of there and get on here" until I saw plaintiff stumbling alongside of defendant's train. From the point where plaintiff begun to stumble until he finally fell was about thirty feet. When plaintiff fell he was off of the platform and close to the wagon road at the south end of said depot platform. The first intimation that I had that a man was run over was when the conductor jumped off of his train and said to me, where I was standing close to the office, that a man was run over. I said, "The devil there was," and started after the conductor to where he was trying to assist the man on the car. After we got to the injured man he tried to st-nd on the foot that was run over, but could not, and we then carried him on the depot platform and pulled off his left boot, and we then found a fracture of about four inches above the ankle—about four inches of his leg was crushed as by a car wheel. The skin of his foot was not broken except in one place where the bone worked through. The bone of his left leg was crushed about four inches in length, and a print on the sole of his boot, which is the print of a car wheel, and two or three of his toes were mashed and heel bruised. There was some one in the crowd that gathered that went over to the Commercial hotel and brought a cot over and laid plaintiff on the cot; but before this I started up town to get some doctors. I started to go after Doctors Jones and Bogie to the Commercial hotel, and after a short time, by request, Dr. Yarborough was secured, who is the defendants company's physician. After that I returned to the depot platform and assisted in carrying plaintiff over to Commercial hotel at Ardmore, which was about 4 o'clock a. m.
39 of the 11th day of July, 1890. I think the train was due at Ardmore at about 3.07 a. m. at that time, and think train

was on time, and it was about 4 o'clock a. m. when he removed plaintiff from the depot platform to the Commercial hotel. When Dr. Yarbourough arrived at said Commercial hotel plaintiff was then lying on a table at Commercial hotel. Some one put him (plaintiff) in that position, but do not know who it was. When the doctors came to Commercial hotel they made an examination of plaintiff's injuries, and finally began operating on his left foot and leg. I know it was after 8 o'clock a. m. on the morning of the 11th of July, 1890, before the doctors amputated plaintiff's leg. After working on the leg for about three hours they administered drugs, etc., to the injured man while performing the operation. Plaintiff seemed to suffer very much before he was under the influence of drugs, as he was very hard to drug. There was only two doctors present at the amputation and one medical student named Hardy. I saw plaintiff about 10 o'clock on the morning of the 11th day of July, 1890, and his leg was amputated. I continued to visit plaintiff at Commercial hotel for several days after he received his injury. I do not know how long plaintiff remained at Commercial hotel, but he remained there for some time after he sustained the injury. My duty as night clerk for Western hotel was to meet all trains and show people to bed and call them for trains. The width of the defendant's depot at Ardmore on or about the 11th of July, 1890, was between twelve and fourteen feet wide and about eight or ten inches higher than defendant's track at the south end of platform, but a little higher from said track about half way between waiting-room and the south end of platform. I think it is from ten to twelve inches high at the waiting-room from the track. From the edge of the platform to defendant's track is about ten or twelve inches. There was a few lanterns on defendant's platform on the morning of the 11th of July, 1890. The conductor of train had a lantern in his hand and (conductor) was stepping up between the cars. The man on the baggage cars also had lanterns. There was no stationary light on defendant's platform. The night of the 10th and the morning of the 11th of July, 1890, was star light, but don't think the moon was shining at the time. When plaintiff began stumbling alongside of defendant's train I was about seventy-five or eighty feet from him, and did not recognize him at the time on account of the darkness of the night. From the waiting-room to the south end of the depot platform is about one hundred feet. The south end of platform has been altered to some extend since the 11th day of July. At that time it was a step-off of about ten inches, while at the present time it is a gradual slope.

LUM JOHNSON, witness for plaintiff, being duly sworn, testified in substance as follows, to wit:

I reside at Ardmore, Chickasaw nation, Indian Territory. I am familiar with defendant's depot platform at Ardmore. I made an examination today (April 10th, 1891) of the condition of said platform.

(Witness was asked to state to the jury the result of such examination and what were the measurements made by him. Defendant

objected to witness testifying from his measurements taken on April 10th, 1891, because they were taken about nine months after plaintiff sustained his injury and did not show the condition and measurements of said platform at the time plaintiff was injured. Objection overruled by the court; to which action of the court in so overruling such objection defendant then and there at the time duly excepted and still excepts.)

The height of said platform in front of defendant's waiting-room from the level of the ground or defendant's track is thirteen inches. Witness stated that he stepped the distance from said waiting-room to the south end of defendant's platform. (Defe*dn*ant moved the court to strike out the testimony and the statement of witness as to his having stepped such distance, because such testimony is not reliable and because it was done about nine months after plaintiff sustained his injury. Objection overruled by the court; to which action of the court in so overruling such objection defendant then and there at the time duly excepted and still excepts.) From the waiting-room to the south end of depot platform is 135 feet. I also measured the height of platform from the level of the ground at three different places, namely: In front of depot waiting-room it is 13 inches from the ground. About midway between wait-
41 ing-room and the south end of platform to the level of the ground is 10 inches, and from the south end or edge of said depot platform to the level of the ground is eight inches in a slope. The distance from defe*dn*ant's track to the edge of the depot platform is 30 inches. I do not know whether the present platform is the same platform that was at the Ardmore depot on the morning of July 11th, 1890, or not, or whether the platform now there is of the same dimensions, height, etc., as it was on July 11th, 1890.

(Defendant now moved the court to strike out Lum Johnson's testimony as to measurements, because his measurements were made about nine months after the accident and did not show the condition and measurements of the said platform at the time plaintiff was injured, and there was no testimony to show that the platform at the time witness Johnson measured it was in the same condition and of the same measurements as when plaintiff was injured; which motion to strike out such testimony was overruled by the court; to which action of the court in so overruling such motion defendant then and there at the time duly excepted and still excepts.)

J. H. SHANE, plaintiff, being duly sworn, testified in substance as follows, to wit:

I reside in Pickens county, Chickasaw nation, Indian Territory, about twenty miles from the town of Ardmore, in Chickasaw nation. During the month of July, 1890, I resided where I do at the present time. I was in Ardmore on the 10th and 11th days of July, 1890. I came to Ardmore from my home on the 10th of July, 1890, with the purpose of leaving Ardmore for Paris, Texas, where I was

subpœna-d to testify in a case pending in that court. I started to travel on defendant's railroad from Ardmore, and before starting I procured a ticket at defendant's ticket office at Ardmore. I have that ticket in my possession. (Witness produces ticket.) My name is on the back of ticket. I do not know who endorsed my name on the back of ticket, but W. B. Johnson, of Ardmore, had ticket in his possession after I was hurt, and I think he put my name on the back of the ticket. I bought and paid for the ticket at defendant's depot in Ardmore. After procuring ticket I started to get on the train, and by mistake I got on the wrong place. Some say I was on the blind baggage, but am not positive about that, because I am not familiar with the
42 names of coaches. As I was going up the steps of the cars the train started to move. There was an old man named Jack Edwards with me, and nobody else. Said Jack Edwards started up the steps of the cars in front of me, and just as I got on the steps the car moved. After I was on the car the conductor in charge of train ordered me off of the car and said, "Come down from there." The train was then going, and we informed the conductor of the train that we had tickets. He then said, "Come down from there and get on here." Jack Edwards alighted from the car platform before me and started up to the car where ordered, and I started down steps from car platform after him, but by some means I stumbled (while trying to get off the train) and could not recover myself until the train had run over my left leg and foot. I cannot state the exact time that I commenced stumbling, but it was either when I come down the steps of the car or when I struck the platform of depot. When I stumbled first my right shoulder struck end of car and I took hold of an iron rod at the end of the car and that jerked me down. I was dragged for a few steps between car and platform, when I fell down and the train run over my left ankle. The train started just as I was going up on the steps of the cars. First time when the conductor ordered me off the car, which they said was the blind baggage, the train was in motion and did not stop until after I fell and was run over. We were leaning against the door of the car, on the platform, that we first went on when the conductor ordered us off. The door of the car was fastened in some way and we could not get it open. I could see passengers in this car, but I could not get in on account of the door being locked. I intended to enter a passenger car, and if I was on the blind baggage it was by mistake, through my ignorance of the kind of car it was. When the conductor ordered me down he was on the depot platform, and when he gave us the order I told him that we had tickets. He then said, "Get down from there and get on here." I was on the front of the car that I wanted to enter, and on coming down the steps of the car my right side was against the car, and I caught hold of the side iron rod with my right hand and suppose I was dragged about 30 or 40 feet before I fell and was run over. I fell close to the south end and edge of defendant's depot
43 platform. This accident was in the night-time, which was a starlight night. The reason that I tried to get off of the car

was because the conductor ordered me off. I did not think it was dangerous to get down from the car, as the conductor ordered me to do it. I was not accustomed to traveling on the cars and thought it my duty to obey the conductor's orders.

Plaintiff now introduced in evidence the ticket purchased from defendant's agent at said Ardmore, the face of which is endorsed as follows:

G., C. & S. F. R'y Co.

Good, when stamped by selling agent, for one first-class passage.

ARDMORE

TO

GAINESVILLE.

On the back of the ticket is endorsed as follows:
(Stamped in circular form:)

G., C. & S. F. R'y Co.

July 11th, 1890.

Ardmore, Indian Territory.

I had to have my leg amputated just below the knee by reason of it having been run over by train. My leg was mashed to pieces above my ankle for about four inches and bones mashed into dust. My foot was amputated by Doctors Yarbourough and Brown. I do not know whether any other physician assisted in the operation or not. It was about six weeks after this accident before I could get around, but left the Commercial hotel, at Ardmore, the twentieth day after I sustained the injury and was hauled to my home in a wagon. I am 33 years of age. My occupation is that of a farmer and was at the time I sustained this injury. Prior to the time of this accident my health was good. I was never confined to my bed from sickness for a day prior to this accident. Since the accident my health has not been so good, as I am subject to fever spells which continue for two or three hours to one day and night at a single time. These fever spells come on me sometimes every day in the week and then again every few days. I have never been able to work any since this accident.

44 (Witness was here asked by his counsel to state what family he had and how many children, if any, he had; which question was objected to by defendant's counsel as being incompetent, irrelevant and immaterial, and because by such question it was sought to bring out testimony before the jury that was not proper to be considered by them in this case; which objection was by the court overruled and such testimony admitted, and to which action of the court in so overruling such objection and admitting such testimony defendant then and there at the time duly excepted and still excepts.)

Witness answered: I have a family consisting of my wife and two children.

(Witness was then asked by his counsel to state what his financial condition was and what means, if any, he had besides his labor with which to support his family; which question was objected to by defendant's counsel on the ground that it was incompetent, immaterial and irrelevant, and because it was sought by such question to bring out testimony before the jury that was not proper to be considered by them in this case; which objection was by the court overruled and such testimony admitted; to which action of the court in so overruling such objection and admitting such testimony the defendant then and there at the time duly excepted and still excepts.)

Witness answered: I am a poor man and have no means to support my family without my labor.

(Defendant then moved the court to strike out all testimony tending to show or showing that plaintiff had a family consisting of a wife and two children and was a poor man and unable to support his family, because such testimony was incompetent, irrelevant and immaterial, and could not properly be considered by the jury in this case; which motion was overruled by the court, and to which action of the court in so overruling such action to strike out such testimony defendant then and there at the time duly excepted and still excepts.)

(Witness was asked by his counsel how long it took the physicians to amputate his leg; to which question defendant objected on the ground that such question was incompetent, immaterial, and irrelevant to the issues in this case, and on the further ground that the plaintiff in his original complaint attempted to allege facts sufficient to charge and attempted to charge the defendant with negligence of the physicians and surgeons in their treatment of the plaintiff at the time of the first operation, and the court upon demurrer by defendant held that such matter was not properly alleged and gave plaintiff leave to amend his complaint in that and other respects, and in said amended complaint, upon which this case is now being tried, there is no allegations whatever charging or attempting to charge the defendant with the negligence of such physicians and surgeons in the amputation of plaintiff's leg or as to the length of time in which such physicians and surgeons were occupied in so operating upon plaintiff's leg; which objection was by the court overruled and such testimony admitted; to which action of the court in overruling such objection and in admitting such testimony defendant then and there at the time duly excepted and still excepts.) To which question witness answered: I do not know how long it took the physicians to amputate my leg, but it was amputated by 9 o'clock on the morning of the accident. My leg was amputated at the Commercial hotel, in said Ardmore. I suffered pain from the amputation of my leg, and my legs pains me at times up to this date.

(Witness was then asked by his counsel whether or not there was a second operation performed or amputation of his leg made by the doctors; to which question defendant objected on the ground that such question was incompetent, immaterial, and irrelevant to the issues in this case, and on the further ground that the plaintiff in his original complaint attempted to allege facts sufficient to charge the defendant and attempted to charge the defendant with negligence of the physicians and surgeons in their treatment of the plaintiff at the time of the first operation, and also with negligence of the physicians and surgeons in operating the second time upon plaintiff's leg, and the court upon demurrer by defendant held that such matter was not properly alleged and gave plaintiff leave to amend his complaint in that and other respects, and in said
46 amended complaint, upon which this case is now being tried, there is no allegations whatever charging or attempting to charge the defendant with the negligence of such physicians and surgeons in the amputation of plaintiff's leg or as to the length of time in which such physicians were occupied in so amputating plaintiff's leg; which objection was by the court overruled and such testimony admitted; to which action of the court in overruling such objection and admitting such testimony defendant then and there at the time duly excepted and still excepts.)

The witness answered: After my leg was amputated there was another operation performed by the same doctors upon me. The physicians sawed and filed about one-half inch of bone that worked through my leg above the ankle. They sawed and filed on said one-half inch of bone until it was even with the skin of my leg; that operation was a few days after the amputation of my leg, but while I was in the Commercial hotel. After the second operation the bone of my leg seemed to be shivered, and five pieces of shivered bone worked out of my leg. It worked through after I reached my home. I think it was about one month from the time the first piece of bone came out of my leg until the last piece did. This second operation upon my leg was a very painful one, and in consequence thereof I suffer much pain and suffer up to this present day.

(Thereupon defendant moved the court to strike out of this case and withdraw from the consideration of the jury all testimony proving or tending to prove any facts or circumstances showing negligence on the part of the physicians who treated plaintiff's injuries and who amputated his leg either the first or second time, for the reason that the plaintiff in his original complaint attempted to allege facts sufficient to charge and attempted to charge the defendant with the negligence of the physicians and surgeons in their treatment of the plaintiff at the time of the first operation, and also with the negligence of the physicians and surgeons in operating the second time upon plaintiff's leg, and the court upon demurrer of defendant held that such matter was not properly alleged and gave plaintiff leave to amend his complaint in that and other

particulars, and in said amended complaint, upon which this
47 cause is now being tried, there is no allegation whatever charging or attempting to charge the defendant with the negligence of such physicians and surgeons, and because such testimony is incompetent, irrelevant, and immaterial to the issues in this case; which motion to strike out such testimony the court overruled, and to which action of the court in overruling such motion to strike out such testimony defendant then and there at the time duly excepted and still excepts.)

Cross-examination:

The passenger train that I intended to leave upon the morning of the 11th of July, 1890, had not arrived at Ardmore at the time when I purchased my ticket from defendant's agent at Ardmore, as I purchased the ticket about one-fourth of an hour before the arrival of train. When the conductor of the train ordered me off of the car he was on the depot platform. I was on a car close to the engine. There was two box cars and perhaps more between the car that I was on and the engine of the train. My reason for going to Paris, Texas, was to answer a subpœna as a witness in a case pending in the United States court at Paris, Texas; the case was a "whiskey case" against one Henry Stevenson, who is a negro. Jack Edwards was on the train when I was ordered off by the conductor; said Jack Edwards since that time died; there was no third party with me at the time I boarded said car. I saw a young man on the depot platform, but he was not with Jack Edwards and myself. I do not know the young man's name or where he is at present; this young man did not leave the car where Edwards and myself were and run back to one of the passenger coaches and then return to the car and give us information as to who was in car. Jack Edwards and myself started from our homes together, both destined for Paris, Texas, on the same business; Jack Edwards was not under a criminal charge when he left or intended to leave Ardmore.

Defendant's counsel then asked witness what his purpose was in getting on the platform of the baggage and express cars or blind
48 baggage of said train instead of getting on the passenger cars of said train; to which question plaintiff's counsel objected.

The court thereupon asked defendant's counsel what was the object and purpose of such question.

Defendant's counsel stated that they expected to show by this witness that his purpose in so going upon said platforms of said baggage and express cars was an unlawful and improper purpose.

Whereupon the court stated that defendant would not be permitted to go into such matter, and sustained plaintiff's objection; to which action of the court in so sustaining plaintiff's objection to such question and in refusing to permit the witness to answer such question defendant then and there at the time duly excepted and still excepts.

Defendant's counsel then asked witness if it was not true and if it was not also known to this witness on the 11th day of July, 1890, that said Jack Edwards had been convicted of stealing cattle.

To which question plaintiff's counsel objected, and which objection the court sustained and refused to permit witness to answer such question, and to which action of the court in so sustaining such objection and refusing to permit witness to answer such question defendant then and there at the time duly excepted and still excepts.

Defendant's counsel then asked witness if it was not true and also known to witness on said 11th day of July, 1890, that said Jack Edwards was charged with unlawfully introducing liquor into the Indian Territory.

To which question plaintiff objected. Whereupon the court asked counsel for defendant what was the purpose of such question.

Whereupon defendant's counsel stated that they expected to show that said Jack Edwards was at time plaintiff was injured so charged with such crime and that this witness was aware thereof, and that defendant expected further to show that this witness went upon said blind baggage in order to assist said Jack Edwards in concealing himself from officers of the law, who wanted to arrest said Jack Edwards for such crime.

49 Whereupon the court sustained plaintiff's objection to such question; to which action of the court in so sustaining such objection and in so refusing to permit witness to answer such question defendant then and there at the time duly excepted and still excepts.

Defendant's counsel then asked witness: Was not your purpose in going upon said blind baggage to assist said Jack Edwards in concealing himself from such officers of the law as wanted to arrest him on charge of unlawfully introducing liquor into the Indian Territory?

To which question plaintiff's counsel objected, and which objection the court then sustained, and to which action of the court in so sustaining such objection and in so refusing to permit witness to answer such question defendant then and there at the time duly excepted and still excepts.

Defendant's counsel then asked witness: Did you not, at your home in the Indian Territory, within a week prior to the day you received your injury herein complained of, say to one Sam. Brown, a deputy United States marshal for the United States court which holds its session at Paris, Texas, that you helped Henry Stevenson, a colored man, to unlawfully bring liquor from Texas into the Indian Territory?

To which question plaintiff's counsel objected.

Whereupon the court asked defendant's counsel what was the purpose of such question.

Thereupon defendant's counsel stated that they expected to show by this witness that witness had both by himself and with one Henry Stevenson unlawfully introduced liquor into the Indian Territory, and that plaintiff went upon such platform of such baggage and

express cars or blind baggage for the purpose of concealing himself from officers whom plaintiff feared were looking for him and were about to arrest him for so unlawfully introducing liquor into the Indian Territory.

Whereupon court sustained said objection of plaintiff's counsel to said question, and stated that defendant would not be permitted to go into such matters.

To which action of the court in so sustaining said objection and in not permitting witness to answer such question defendant then and there at the time duly excepted and still excepts.

50 Defendant's counsel then asked witness: Did you not at such time and place say to said Sam. Brown that you had in your house concealed liquor unlawfully brought from Texas into the Indian Territory by yourself and said Henry Stevenson?

To which question plaintiff's counsel then and there at the time objected, and which objection was thereupon sustained, and to which action of the court in so sustaining said objection and refusing to permit witness to answer such question defendant then and there at the time duly excepted and still excepts.

Defendant's counsel then asked witness: Did you not at such time and place state to said Sam. Brown that you had concealed in your house liquor that said Henry Stevenson had unlawfully brought into the Indian Territory?

To which question plaintiff's counsel then objected, and which objection was by the court sustained, and to which action of the court in so sustaining said objection and in refusing to permit witness to answer said question defendant then and there at the time duly excepted and still excepts.

Defendant's counsel then asked witness: Was not your purpose in going upon said platform of said baggage and express cars or blind baggage of said train to conceal yourself from officers of the law whom you believed to be looking for you to arrest you on the charge of unlawfully introducing liquor into the Indian Territory?

To which question plaintiff's counsel objected, and whereupon the court sustained said objection, and to which action of the court in so sustaining said objection and in so refusing to permit witness to answer such question defendant then and there at the time duly excepted and still excepts.

Defendant's counsel then asked witness whether the young man mentioned in the testimony did not leave witness and Jack Edwards on the said blind baggage of said train and go back to the passenger coaches on said train and then return to this witness and Jack Edwards and tell witness and said Jack Edwards that there were no officers on said train.

51 To which question plaintiff's counsel objected, and which objection was by the court sustained, and to which action of the court in so sustaining said objection and in so refusing to permit witness to answer such question defendant then and there at the time duly excepted and still excepts.

Plaintiff rests.

Defendant's Evidence.

T. J. STAR, witness for defendant, being duly sworn, testified in substance as follows, to wit:

I reside at Ardmore, Chickasaw nation, Indian Territory. During the month of July, 1890, I resided at Oklahoma City, Oklahoma Territory. The first time I met plaintiff was on the night of the 10th of July, 1890, at the Western hotel, in said Ardmore. There was an old man and a young man about twenty years of age with plaintiff when I saw him. The next time I saw plaintiff was on the morning of the 11th of July, 1890, at defendant's depot platform in said Ardmore, and saw defendant's conductor in charge of said train assist plaintiff in getting on said train. When I saw the said conductor assist plaintiff on the cars plaintiff was on his hands and knees. I went out of the car to assist the conductor, and we carried plaintiff on the said depot platform. When I first came to plaintiff's assistance he informed the conductor and myself that his leg was broken, and I also heard plaintiff say that he wanted to go to Paris, Texas. Plaintiff also said, while on his hands and knees on the said car, that his partner was on the said car, and that he (plaintiff) wanted his partner to come off of said car and remain with him. After we carried plaintiff on the platform I left him. The first thing that attracted my attention that night while on the said train was some words that were spoken on the outside of the train *and* the train slowed up. I then went to the front end of the car and saw the said conductor assist plaintiff on the car. The train did not move but eight or ten feet after I heard this conversation and my attention became attracted, but from the time the train started until it stopped was about 120 feet.

52 I do not know at what rate of speed the said train was running. I suppose the conductor and myself carried the said plaintiff about 60 feet and laid him close to the south end of the said depot platform and on the north side of the Main-street crossing, at the south end of said platform. Plaintiff was very near the south end or south side of Main street when we picked him up. Where we found plaintiff was on the ground and on a level with the defendant's track, but it has since been changed. I was a passenger on that train that morning of the 11th of July, 1890, and I suppose I was at the depot about one-half hour before the arrival of said train, as the said train was late that particular night. I also saw said Edwards (the old man) on the said depot platform that night before the said south-bound train came in.

(Witness was here asked by defendant's counsel what, if anything, he knew as to the passenger trains of the Gulf, Colorado & Santa Fé Railway Company having been robbed by train robbers in the vicinity of Ardmore and just prior to the 11th day of July, 1890, the day on which plaintiff received his said injury; which question was objected to by plaintiff as being immaterial, and which objection was by the court sustained, and to which action of

the court in sustaining such objection defendant then and there at the time duly excepted and still excepts.)

(Defendant then offered to prove by this witness that on several occasions just prior to the day upon which plaintiff sustained injuries complained of that in the immediate vicinity of said Ardmore defendant's passenger trains had been robbed and attempted to be robbed by train robbers; which testimony was offered in support of the theory that defendant's conductor, when he so discovered plaintiff and his companion upon the blind baggage of said train, was justified in believing that they were there with an unlawful and improper purpose, and under all the circumstances the conductor acted in a reasonable and proper manner in ordering plaintiff and his companions to get off said blind baggage; to the admission of which testimony plaintiff objected because the same was immaterial, and which objection was sustained by the court,
53 and to which action of the court in sustaining such objection and refusing to admit such testimony defendant then and there at the time duly excepted and still excepts.)

The platform at the said depot is between 15 and 16 feet longer at the present time than it was during the month of July, 1890; there is a walk at the south edge of said depot platform which makes it in all about 19 feet longer at the present time than it was during the month of July, 1890; the passenger train upon which I left and upon which plaintiff attempted to leave was on the east side of defendant's depot platform and was going south.

Cross-examined:

At present there is a slope of four feet at the south end of the depot platform, but during the month of July, 1890, at that time, it was a step-off; the slope begins at about where the platform ended before the slope was made. I was not ordered off the train, because I got on at the proper place; there was more than one way to enter said cars. It was about eight or ten feet from the depot waiting-room to the platform of defendant's coaches where passengers were getting on and off; sometimes the coaches stop opposite the said waiting-room door, as there is always more than one car to a train. I did not observe where the last car of the said train stood with reference to the waiting-room door. I do not remember whether this night was a moonlight night or not. I could see very well. The conductor- of trains generally carry lanterns with them. The first that I saw of plaintiff at said depot was after he was injured and the conductor was then shoving him on the steps of the said coach. Plaintiff did not receive his injuries after I saw him, but before I saw him that morning at the said depot platform; after the conductor assisted him on the train, after his said leg was broken, he said he wanted to see Uncle Jack and that he wanted said Uncle Jack to remain with him. The said conductor and myself, after we realized that plaintiff was injured—we set him down on the said depot platform. Plaintiff was south of the south end of the platform, or near the street, when injured, and we carried

him to the said platform. I do not know the width of the street where we found plaintiff, but think it is 50 or 60 feet wide
54 south of the said platform. The said train was in motion when I saw the said conductor assist plaintiff on the said train, but the said train did not go over eight or ten feet when I saw that. The train stopped after I saw the conductor assist plaintiff on the cars, which was the first stop they made from the time they started.

JAMES PETTYJOHN, witness for defendant, being duly sworn, testified in substance as follows, to wit:

I reside at Ardmore, Chickasaw nation, Indian Territory. My occupation is that of a druggist. During the month of July, 1890, I resided at said Ardmore, but at that time was engaged in the mercantile business with one D. D. Flow. I remember of seeing plaintiff during the month of July, 1890, at defendant's depot at said Ardmore. I saw plaintiff crawling on one of the cars a little north of defendant's waiting-room. I was a passenger on defendant's south-bound train on that night, and about the time the said train started to pull out of said Ardmore I heard some one say, "Oh," and instantly some one pulled the bell cord of the train, and I then knew that some one was hurt. I then went to the rear end of the car and saw plaintiff crawling up on the steps of said cars. Somebody at that time asked plaintiff what he wanted. Plaintiff replied by saying that he was hurt, and that his partner was on the train, and that he wanted his partner to get off of the train and remain with him. That was the first time that I ever saw or met plaintiff. When the said south-bound train arrived at Ardmore I was at said waiting-room. I suppose said train remained at said Ardmore four or five minutes before it pulled out, but am not positive as to that. After said train arrived at said depot platform and before I boarded said train I met R. H. Carter, of the Western hotel of said Ardmore, and some traveling man that I was conversing with on said platform before boarding said south-bound train. Before I heard the word "Oh" I heard some one say, "Get down from there," but don't know of my own knowledge who made that remark, as I was not familiar with the voice. To the best of
55 my recollection, it was a bright, starlight night, but think the moon had gone down by that time. I was on the rear end of the smoking car of said train when I saw plaintiff crawling on said car. The car immediately in the rear of said smoking car was a passenger car. I don't recollect of any person in said passenger car behind me that I was acquainted with, but I do know that there were passengers in the car. The steps of said smoking car was between fifty and twenty feet south of defendant's waiting-room. I do not recollect whether anybody else entered the same car that I did or not on that night, but I know that there were other passengers who entered that train *on* said Ardmore on that night. I did not enter said car until the train had started to pull out of said Ardmore, as I was speaking to one of my friends on said platform.

To the best of my knowledge, the said train moved 25 or 30 feet from the time it first started until it stopped.

Cross-examined:

The first time I saw plaintiff was when I saw him up on the passenger coach, but before I heard some one say "Oh!" I think the train was then in motion, but am not certain as to that. I then heard some one say, "Get down from there," and then heard the word "Oh" after I heard the first remark. I think that night was a bright starlight night, but think the moon had gone down.

Witness was asked by plaintiff's counsel if just before he heard the word "Oh" he did not hear some one say, "Get down from there and get on here."

Witness answered: No; I heard some — say, "Get down from there."

I think there was three passenger coaches attached to that train that night—the smoker, another passenger car, and the sleeper. There was also a mail car and a baggage car in front of the passenger car. There was two cars in front of the smoker and two cars behind the smoker.

J. C. MURPHY, witness for defendant, being duly sworn, testified in substance as follows, to wit:

My occupation is that of a passenger conductor for the
56 Gulf, Colorado & Santa Fé Railway Company and was such on the 11th day of July, 1890. I was conductor on the south-bound passenger train that passed through said Ardmore on the early morning of the 11th of July, 1890. My train stopped at said Ardmore on the morning of the 11th of July, 1890, about seven minutes. I gave my engineer the signal to pull out about five minutes after I arrived at said Ardmore, but he was working with his engine and delayed pulling out for about two minutes. I saw plaintiff after I gave the engineer the signal to pull out. My attention was first attracted to plaintiff by seeing a boy about 18 years of age get off of the blind baggage and run back to one of the passenger coaches and look into it and then returned to the blind baggage again. I then followed the said boy back to the blind baggage, where I discovered two men (one of them the plaintiff) on the said blind baggage. I ordered the men off of said blind baggage, and after they got off they informed me that they had tickets. I told them that they had no business on the blind baggage, and that they ought to know that they ought to be in the passenger coaches. I then told them not to get on again until I could stop the train for them, and that I would stop the train for them. After stopping the train I went to see where plaintiff was and found him hanging on the south end of the first-class passenger coach. I asked him what was the matter, and he informed me that his leg was broken, but he wanted to get inside of the second-class coach to see his partner. I assisted him partially, and I then went into the car and

told some of the passengers to assist me in getting him off. Some one helped me carry him to the south end of the depot platform. I then went after a doctor and had plaintiff removed to the Commercial hotel, in said Ardmore. I have been a conductor for about seven years and have been employed by defendant in that capacity since June or July, 1890. My train on the morning of the 11th of July, 1890, consisted of five cars. Next to the engine was the mail and express car, which is called a combination car; then comes the baggage car, then the second-class coach, the first-class coach, and the sleeper. The first and second class coaches and the sleeper
57 are provided for passengers to ride upon. No one is allowed to ride upon the blind baggage.

I found these parties on the blind baggage, as aforesaid, which is between the baggage and the mail and express cars. The above is a complete description of the train that I was in charge of and that passed through said Ardmore on the 11th day of July, 1890, and upon the blind baggage of which I found plaintiff.

(Witness was then asked by defendant's counsel what kind of class of people, if any, witness knew to be in the habit of riding upon the blind baggage of his passenger trains running on said railroad through said town of Ardmore and at or just before the said 11th day of July, 1890; to which question plaintiff objected as immaterial, and which objection the court sustained and refused to permit the witness to answer such question and refused to admit such testimony; to which action of the court in sustaining such objection and in refusing to permit witness to answer such question and in refusing to admit such testimony defendant then and there at the time duly excepted and still excepts.)

(Defendant then offered to prove by this witness that, prior and up to the said 11th day of July, 1890, *that* a great many persons were discovered by witness riding upon the blind baggage, between the baggage car and mail and express car-, of the train upon which this witness was conductor, and it was always found that such persons so found upon such blind baggage were tramps stealing a ride or persons with some unlawful and i-proper design upon said train or the persons and the property therein. Defendant's counsel st the time stated that they expected to follow up such testimony by further testimony as to particular unlawful acts of such persons so found upon such blind baggage; to which offer to prove such facts and to such testimony plaintiff objected as immaterial, and which objection the court sustained and refused to admit such testimony, and to which action of the court in so sustaining such objection and in so refusing to admit such testimony defendant then and there at the time duly excepted and still excepts.)

I cannot state how many passengers entered my train at Ardmore on that particular night and train, but there is usually
58 between fifteen and twenty-five enter this station every time I pass through, and there were several passengers entered into the passenger coaches on that particular night and train. Plaintiff had no right to be on the blind baggage of my train that

night. The first time I saw plaintiff was when I followed this boy from said passenger coach to the blind baggage. I didn't know but what there were tramps or robbers upon said blind baggage trying to rob the train. The reason I ordered plaintiff and his companions off of said blind baggage is because no one is allowed to ride on said blind baggage and because it is against the rules of the company for any person to be upon the blind baggage. The lamps were all burning in my car- that night. I do not remember how many lights I had in the cars that night. Some coaches had more lights than others, but all the coaches were well lighted. There was 26 or 27 windows on each side of each car that I had that night. Passengers got on my train between the first and second class coaches. Either myself or brakeman stand with our lantern at the steps between said first and second class coaches and assist passengers in getting on and off of the cars. On that particular night the second-class coach stopped a little south of the depot waiting-room and the steps between the first and second class coach was nearly opposite the depot waiting-room.

(Defendants' counsel asked witness the question as to what was the witness'*es* duty as such conductor towards seeing passengers on and off of the different trains of defendant's railway and particularly on the train in question; to which question plaintiff objected; which objection was sustained by the court, and to which action of the court in so sustaining such objection and refusing to permit witness to answer such question defendant then and there at the time duly excepted and still excepts.)

(Defendant then offered to prove by witness, J. C. Murphy, its conductor and the conductor upon the train by which plaintiff was hurt, that on that particular night on which the plaintiff was hurt and for a long time prior thereto that it was a rule of this
59 railway company that all passengers should enter its trains upon the first or second class coaches at the platform between the two coaches and that the conductor and brakemen of that train were there at such entrance and platform between such first and second class coaches when the t-ain arrived at said Ardmore on said night or morning of said 11th of July, 1890, for the purpose of assisting passengers off and on said trains, in compliance with such rule, and actually did assist passengers in getting upon said train at said time, which was a reasonable rule and regulation, and that this rule and regulation was reasonable and necessary for the safety of all passengers, and that said rule was well known and well published.

The court said to defendant's counsel "that unless you can bring home knowledge of such rule to plaintiff and show that plaintiff had actual knowledge of the rule you cannot prove it." Defendant's counsel replied to the court "that they did not know whether they could show that plaintiff knew of such rule, but they could and would show that plaintiff had reasonable and full and ample opportunity to know of such rule, and that if he did not know of such rule it was alone due to his own carelessness and

neglect." Whereupon the court sustained plaintiff's objection to such offer and to such testimony and refused to admit such testimony; to which action of the court in so sustaining such objection and refusing to admit such testimony defendant then and there at the time duly excepted and still excepts.) The depot was lighted up, to the best of my knowledge. Me and my brakeman had regular hand lanterns that we held between the first and second class coaches while assisting passengers on the cars. I cannot state whether there were any other lanterns around or not.

(Counsel for defendant then asked witness to state what, if anything, he knew about persons traveling upon the blind baggage of defendant's passenger trains leaving said Ardmore for the south at about the same hour of the day and running on the same schedule time as the train in question and upon the blind baggage of which train plaintiff was then discovered by witness robbing and attempting to rob defendant's said trains several different occasions
60 and within a very recent time prior to said 11th day of July, 1890; to which question plaintiff objected as being immaterial; which objection was by the court sustained and witness was not permitted by the court to answer such question; to which action of the court in so sustaining said objection and in so refusing to permit said witness to answer said question defendant then and there at the time duly excepted and still excepts.)

(Defendant then offered to prove by this witness that on several different occasions within a very recent time prior to said 11th day of July, 1890, defendant's different passenger trains leaving Ardmore for the south at about the same hour and running on the same schedule time as the train in question upon the blind baggage of which plaintiff was discovered by witness had been robbed and also attempted to be robbed by persons who had gotten on said blind-baggage platform at the town of Ardmore; to which testimony plaintiff objected, and which objection was by the court sustained, and to which action of the court in sustaining said objection and in refusing to admit such testimony defendant then and there at the time duly excepted and still excepts.)

Cross-examined:

To the best of my knowledge my train was due at that time at said Ardmore at 3.08 a. m., but we were about fifteen or twenty minutes late that night. I do not know how many lights were in the first and second class coaches that night. The shades in the cars are not pulled down more at that time in the morning that at any other time, because the shades are to protect passengers from the sun. Passengers are generally lying down about the time of night that we passed through Ardmore on the 11th day of July, 1890. I cannot state whether the shades to those cars were up or down *on* that particular time and date. The lamps in the cars burned brightly at that time of the night as at any other time. I cannot tell how many lamps were in my coaches that night; some coaches have more lamps than others. I took charge of the train

upon which plaintiff was injured the 11th day of July, 1890, at Purcell, Indian Territory. I commenced running in the
61 capacity of passenger conductor for the defendant company either in the month of June or July, 1890, but had been a freight conductor prior to that time. I commenced as freight conductor on the Gulf, Colorado & Santa Fé Railway Company some time during the year 1888. I first run as freight conductor in New Mexico on the Atchison, Topeka & Santa Fé railway. I have also been employed in the capacity of freight conductor on the Atlantic and Pacific Railway Company, running from New Mexico to the State of California, and from that road I came over to defendant's road. I was freight conductor on said Atlantic and Pacific railway for three years and was freight conductor on defendant's road about two years prior to being promoted to the position of passenger conductor for defendant's road. The passenger conductor's position is looked upon as a higher position than that of a freight conductor. I have also run passenger trains before I came to defendant's road, both as a regular and also as a special conductor, but I commenced running a passenger train for defendant either in the month of June or July, 1890. The boy that I saw with plaintiff and the old man seemed to me to be eighteen years of age. I have not seen him since that time. I saw the said boy get off of the blind baggage and run down to the smoking car, look in for a few seconds, then run back to the said blind baggage again, and I then followed him. At that time I was standing at the south end of the smoking-car platform, and the passengers were all in the cars, and I hollowed "All aboard" a few seconds before that time, but the engineer did not take my signal, and the train was not in motion at that time. When I saw the said boy run back to the smoking car the train was not in motion. I followed the boy back to the blind baggage and found the boy and two men on the said blind baggage, and I then ordered them off. The said men and boy did not tell me that they had tickets until they got off of said blind baggage. I remember of telling them to get off of said blind baggage, but did not use the following language: "Get down from there and get on here;" but after they got off of said blind baggage one of the men made the remark, "I've got a ticket."
62 I then said, "Wait and I'll stop the train," and the train was in motion at that time, and as the coaches came along by me I got on the south end of the smoking car or second-class coach and pulled the bell cord, and just after I stepped on said smoking car the old man followed me, and I think boy also. The next time I saw plaintiff he was on the steps of the south end of the first-class passenger coach, which was after he was injured. I do not know how plaintiff got his leg broken. I know it was not broken when he got off of the blind baggage, as I saw him when he got off. I was standing on the ground, beyond the end of the depot platform, when I ordered plaintiff and his companions off of the said blind baggage. I did not move from where I ordered these men off of the said blind baggage, but stood where I was and jumped on said smoking car as it passed and pulled the bell cord to stop the train.

The train moved about 130 feet before it stopped. When I saw plaintiff trying to get on the steps of the car he was about twenty feet south of the south end of the depot platform. The train moved 130 feet from the time I jumped on said smoking car and pulled the bell until it stopped. The plaintiff attempted to get on the next coach behind me, although I did not see him. When the plaintiff and his companions got off of the said blind baggage they were standing south of the south end of said depot platform, on the ground, and I was also south of the south end of the platform, on the ground. I do not order people to get off the train when the train is in motion if they are passengers. Whenever I find a person on the blind baggage I hollow to them to get off, and if he don't get off I stop the train and put him off. The men that I found on the blind baggage did not tell me they had tickets until they were off of said blind baggage. I got on the smoking car from the ground. I did not get on the depot platform to catch the said smoking car, but got on from the ground south of said platform to stop the train to let these parties get on the train. These three parties got off the blind baggage south of the said depot platform and afterwards walked towards the south end of the depot platform. I got on the
63 smoking car before the old man who was with plaintiff did, and I think the boy got on the train after the old man did, but am not positive as to that. I did not see plaintiff again after that until I stopped the train and saw him on the steps after ordering him off of the said blind baggage. He was on the south steps of the first-class passenger coach when I next saw him after ordering him off the said blind baggage. The cars had passed him from the blind baggage to where I saw him on the steps of the first-class passenger coach. When I saw plaintiff on the steps of the first-class passenger coach he was very near the same place where he stood when he got off of the blind baggage. The old man got on the car from the ground and not from the depot platform. I never saw plaintiff from the time I ordered him off of the blind baggage until I saw him hanging on the steps of the first-class passenger coach. The train had started when plaintiff and his companion informed me that they had tickets, and in the meantime the express car had passed us and I had to jump on the smoking car to pull the bell cord to stop the train. I testified in my examination-in-chief that plaintiff and his companions got off of the blind baggage and came down on the ground. I also stated in my examination-in-chief that plaintiff and his companions told me that they had tickets after they were on the ground by the blind baggage, and just as I told plaintiff and companions to get off the blind baggage the train started, because I had given my engineer the signal to pull out before discovering plaintiff and companions on said blind baggage and could not stop in time. We call the platform of the cars between the express and baggage cars the "blind baggage." We usually put our baggage off on depot platforms, and the baggage car was opposite the depot platform. That train also carried some mail, and I suppose there was some mail put off at said Ardmore. The said mail car is in front of the said

blind baggage. It is the custom of the passengers to get on cars between the first and second class coaches, and either myself or my brakeman and sometimes both of us stand with our lanterns at the steps between the first and second class passenger coaches and assist passengers in getting on and off of the cars. It is not usual
64 to have the front end of the smoking car locked and it was not locked on the 11th of July, 1890, when we passed through said Ardmore, although it is sometimes done by the brakeman, but never through my orders. If the end of the smoking car was not locked, passengers could enter there as well as anywhere else on the train.

It is customary for the windows and shades in my cars to be up on warm nights. The passengers want all the fresh air they can get, and therefore want all the windows and the shades both up.

Defendant closed.

Plaintiff's Rebuttal.

J. H. SHANE was called as a witness for plaintiff in rebuttal, and was asked by his counsel whether he had any conversation with the conductor of said train after he was ordered off of said train and before he was hurt; to which question defendant objected as being leading and as not being proper rebuttal, because this matter had been fully testified about when plaintiff was first upon the stand, and it was simply an effort on the part of the plaintiff's counsel to pile up testimony before the jury; which objection was by the court overruled and the witness permitted to answer such question; to which action of the court in overruling such objection and permitting witness to answer such objection defendant then and there at the time duly excepted and still excepts.

Witness answered: I did not have any conversation with the conductor of said train after he ordered me off of the train and before I was injured. I told him we had tickets, and he said, "Get off there and get on here." Conductor did not say anything about stopping train for us. I never got on platform after he ordered me off.

(Witness was then asked by his counsel if he got off of said blind baggage on the ground or if he got off on the depot platform, and when it was that he fell; to which question defendant objected as being leading and suggesting to the witness the answer desired by his counsel and as not being proper rebuttal, and because said matter had been fully testified about by this witness when he
65 was first upon the witness stand, and because it was simply an effort on the part of plaintiff's counsel to pile up testimony before the jury; which objection was by the court overruled and the witness was by the court permitted to answer said question, and to which action of the court in so overruling said *said* objection and in so permitting said witness to answer such question defendant then and there at the time duly excepted and still excepts.)

Witness answered: In attempting to get off the car which they say was the blind baggage and on the depot platform I think is where I stumbled and fell. I never got on the platform, as the conductor stated I did, but stumbled and fell in trying to do so.

Plaintiff closed.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"The court instructs the jury that a presumption of negligence on the part of the carrier is not raised on proof alone of the fact of the passenger being injured, and that it devolves upon the plaintiff to show some positive facts or circumstances showing actual negligence on the part of the carrier;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"The court instructs the jury that if they believe from the evidence that the plaintiff by his own negligence directly contributed in any degree to the injury sued for they will find for the defendant;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there at the time, in the
66 presence of the jury and before the jury retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to instruct the jury in this case as follows, to wit:

"The court instructs the jury that even though they should find from the evidence that plaintiff sustained the injuries complained of while he was endeavoring to follow the commands or directions of the conductor of defendant's train, yet if the jury find that plaintiff might, with the exercise of reasonable care, have avoided the accident which occasioned the said injuries, then you will find for the defendant;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there, at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"The court instructs the jury that if you find in this case that it is a matter of doubt from all the evidence whether the injury complained of by plaintiff can be attributed to any negligence on the part of the defendant or its agents or servants, then you will find for the defendant;" which request of the defendant to so charge the

jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there, and in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"The court instructs the jury that negligence consists in a want of reasonable care which would be exercised by a person of ordinary prudence under all existing circumstances, in view of the
67 probable danger of injury;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there, at the time and in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"That even though you find that defendant or its agents and servants have been guilty of negligence which resulted in plaintiff sustaining the injury complained of in his complaint, yet if you further find that the plaintiff by his own negligent conduct caused or contributed to cause the injury received by him, you will find for the defendant;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to so charge the jury, as so requested by the defendant, the defendant then and there, at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to instruct the jury as follows, to wit:

"The court instructs the jury that it was the duty of defendant as a common carrier to provide a platform at its station at Ardmore, I. T., to be used by such persons as might have lawful occasion to use it, and that it was not necessary or required that said platform should be absolutely safe, but it was only necessary that such platform should be reasonably safe and sufficient for all persons using it who at the time of so using it exercised ordinary and reasonable care, and that if you find from all evidence that defendant had provided such a reasonably safe and sufficient platform at Ardmore station, and that plaintiff, even though he was hurt upon defendant's platform at the time he sustained the injuries complained of, might have avoided hurting himself by the exercise of reasonable and ordinary care, then you will find that defendant
was not guilty of negligence in the manner of platform it at
68 such time had provided at the depot in said town of Ardmore;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there, at the time, in the presence

of the jury and before the jury retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"The court instructs the jury that the defendant railway company was not bound to provide a depot platform brilliantly lighted for the use of its passengers, and that the only duty it owed in this respect to any passenger was to provide such lights on or about such platform as were necessary to render the use of the said platform and the passage over it to and from its train reasonably safe, and in determining as to whether such platform at the time complained of by plaintiff was properly lighted you will take into consideration the darkness of the night and all other attending circumstances;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"The court instructs the jury in this case that if they believe from the evidence that at the time mentioned in plaintiff's complaint the defendant railway company stopped the said passenger train at the depot in Ardmore a reasonable length of time to allow all passengers to get on said train, then it had discharged the obligation that it was under as a common carrier and was under no obligation to plaintiff to stop a second time at said Ardmore station;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by defendant, the defend-
69 ant then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"If the jury find from the evidence in this case that the plaintiff voluntarily got upon the railway train and on the platform of the baggage or express car thereof when plaintiff might have entered within the regular passenger cars of defendant's said train, and that by entering upon said platform of said baggage or express cars plaintiff occupied a more exposed position than he would have occupied in said regular passenger cars, and that by reason of his going upon said platform of said baggage or express cars the injury complained of by plaintiff was received by him, and that he would not have sustained such injury had he gone within such regular passenger cars, then you will find that plaintiff was guilty of such contributory negligence as will prevent his recovering in this case, and you will find for the defendant;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury,

as so requested by the defendant, the defendant then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to instruct the jury in this case as follows, to wit:

"If you find from the evidence that plaintiff did at the time mentioned in his complaint, without the consent of defendant, go upon the platf rm of the baggage or express cars of defendant's said train, and that such platform of such baggage or express cars was not a place obviously intended for passengers on said train to ride upon, and that there was attached to and a part of such train regular passenger cars obviously intended for passengers to ride in, then the relation of passenger and carrier did not exist between plaintiff and defendant, even though plaintiff fully intended to pay regular fare for traveling upon said train over said railroad;" which
70 request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

The defendant thereupon requested the court to charge the jury in this case as follows, to wit:

"The court instructs the jury in this case that if you find that the plaintiff went upon the platform of the baggage or express cars of defendant's *track* and when he might have gone upon or into the regular passenger coaches, and plaintiff was standing or setting thereon, and that such platform of such baggage or express cars was obviously not intended for the use of passengers on a journey, and if by so doing the injury complained of by plaintiff was in part brought about, then you will find for the defendant;" which request of the defendant to so charge the jury the court refused and denied; to which action of the court in so refusing and declining to charge the jury, as so requested by the defendant, the defendant then and there at the time, in the presence of the jury and before the jury had retired from the bar of the court, duly excepted and still excepts.

Whereupon the court charged the jury in writing as follows:

"Charge of the Court to the Jury."

J. H. SHANE, Plaintiff,
vs.
THE GULF, COLORADO & SANTA FÉ R'Y CO., Defendants. } Court's Instructions.

This is an action to recover damages for an injury received by the plaintiff, J. H. Shane, on the morning of the 11th of July, 1890, at the town of Ardmore, Indian Territory. The plaintiff, in his amended complaint, alleges as follows: "The plaintiff, J. H. Shane, complains of the defendant, The Gulf, Colorado & Santa Fé

Railroad Company, and alleges that he is a citizen of the United States, residing in the Chickasaw nation, and that the
71 defendant is a railroad corporation created under the laws of the State of Texas and was the owner of a certain railroad, together with the tracks, cars, and locomotives thereto belonging, and was a common carrier of passengers thereupon for hire between Ardmore, in the Chickasaw nation, and Gainesville, in the State of Texas, and that it was operating its said railroad in the Chickasaw nation by virtue of the laws of the Congress of the United States at the time hereinafter mentioned. Plaintiff alleges that on the 11th day of July, 1890, he had purchased of the defendant's agent a ticket authorizing him to travel as a passenger on the defendant's railroad and cars from Ardmore, Indian Territory, to Gainesville, in the State of Texas, and had gone on defendant's train as a passenger at the depot in the said town of Ardmore, and said train had been put in motion by the agents and servants of the defendant when the conductor in charge of said train ordered plaintiff to get off said train and go thereon in another place; that in obedience to the command of said conductor, and relying on the judgment of said conductor in giving such commands, the plaintiff made an effort to get off said train, and, without any fault or negligence of plaintiff and by reason of the darkness of the night and the gross negligence of the defendant in failing to light up its platform and in not stopping its said train, and by reason of the gross negligence of said defendant in constructing its said platform about fifteen inches higher than the level of the railroad-bed of said road and in leaving a space of about eighteen inches between the curb of said platform and the rail at said defendant's track and the improper and negligent conduct of defendant's conductor in ordering the plaintiff to get off the train while in motion, plaintiff, in getting off of said train, as directed and commanded by said conductor, stepped off of said platform and fell under and said defendant's cars run over his left foot and leg and crushed, bruised, and broke the bones thereof; that by reason thereof the plaintiff became for a long time ill; was obliged to and actually did expend about the sum of — dollars for surgical and other treatment and attendance in attempting to
72 cure himself; was compelled to have his leg amputated, and has thereby become a cripple and prevented for life from actively pursuing his business and was otherwise injured, to his damage in the sum of twenty thousand ($20,000.00) dollars, for which and all other proper relief he prays judgment."

To this complaint of plaintiff defendant answered, saying:

"Comes now the defendant, by its attorneys, and most respectfully asserting that this court has not acquired jurisdiction over this defendant, and not hereby waiving any insufficiency or defect in the writ of summons in this cause, and still saving to itself all manner of exceptions to the ruling of the court on the motion to quash the writ of summons, now makes answer to plaintiff's amended complaint in this cause, and for such answer says that it has no information sufficient to form a belief as to whether plaintiff did, on the 11th day of July, 1890, purchase a ticket of

defendant's agent authorizing plaintiff to travel as a passenger on defendant's railroad and cars from Ardmore, Indian Territory, to Gainesville, in the State of Texas, and therefore denies that such is the fact, and the defendant admits that plaintiff went on defendant's train at Ardmore, I. T., at said time, but denies that plaintiff at said time went upon said train as a passenger, and denies that after said train had been put in motion by the agents and servants of the defendant the conductor in charge of said train commanded plaintiff to get off of said train and go thereon in another place, and defendant admits that said conductor, discovering said plaintiff upon said train at a place thereon commonly known as the blind baggage and where it was improper and dangerous for any person to be, ordered the plaintiff to get off of the platform of the said baggage express car or cars of said train above mentioned as the blind baggage, and the defendant states thereupon said plaintiff got off of said baggage or express car or cars. Defendant denies that, in obedience to command of defendant's conductor and relying upon the judgment of said conductor, the plaintiff, in making an effort to get off of said train or in getting off of said train,
73 without any fault or negligence on part of plaintiff and by reason of the darkness of the night and the gross negligence of the defendant in failing to light up the platform and in not stopping the train and by reason of the — defendant in constructing its said platform about fifteen inches higher than the level of the road-bed of said road and in having a space of about eighteen inches between the curbing of said platform and the rail at said defendant's track, and the improper and negligent conduct of defendant's conductor in ordering the plaintiff to get off of said train, plaintiff, in getting off said train as directed and commanded by said conductor, stepped off of said platform and fell under the said cars, whereupon the defendant's cars run over his left foot and leg and crushed, bruised, and broke the bones thereof, and the defendant denies that —, by reason of having his leg crushed, if he was so hurt, was for a long time ill, and in consequence thereof was obliged to and actually did expend any sum of money for surgical or other treatment for which this defendant is liable. Wherefore defendant, having fully answered, prays that it may go hence without day, and that it have and recover of plaintiff in this behalf its costs laid out and expended."

The averments in the plaintiff's complaint and the denials in the defendant's answer form the issue which you, gentlemen of the jury, are to try, and the court instructs the jury:

(Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to the above-mentioned part of the court's charge.)

First.

That you have nothing to do on the question of the jurisdiction of the court in this case. The court having passed upon and held that it had jurisdiction, the jury must regard that question as settled.

(Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Second.

74 The court instructs the jury that in this case the burden of the proof is on the plaintiff, and in order that he recover he must have established by a fair preponderance of the evidence all the material allegations in his complaint contained.

(Defendant, in the presence of the jury and before they had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Third.

The court instructs the jury that the relation of carrier and passenger between a person traveling and the railroad company begins at the time such person enters upon the premises of such common carrier, and particularly does such relation begin when such person has purchased and paid for a ticket at the ticket office of said company for the purpose of taking passage on the train of such railroad company, and the relation continues until such passenger has reached and is discharged at the place of his destination.

(Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to the above last-mentioned part of the court's charge.)

Fourth.

Railroad companies are held to a strict accountability for the safety of passengers. To enable such companies to discharge this duty they have power to make reasonable rules and regulations respecting the time, mode, and place of entering the cars, and these, when known to the passenger, he is bound to conform to, and he cannot violate them by pursuing another course and hold the company liable for damages thus occasioned, though the jury may believe that an ordinary prudent man might have adopted the same course, yet a passenger who is ignorant of such rules and regulations is not bound to conform to the same, and if he has acted as an ordinarily prudent man might have acted under like circumstances, and if he, by reason of the negligence or fault of the engineer or agent or servant of said railroad company, receives an injury he can hold the company liable for damages.

(Defendant, in the presence of the jury and before they had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

75 Fifth.

The court instructs the jury that in the present case to recover damages against the defendant as a common carrier for injuries caused as alleged by the plaintiff by the negligence and fault of the

train conductor, also by the darkness of the night and the gross negligence of the defendant in failing to light up *his* platform and in not stopping its said train, and by reason of the gross negligence of the said defendant in constructing its said platform about fifteen inches higher than the level of the road-bed *at* said road and in leaving a space of about eighteen inches between the curbing of said platform and the rail at the said defendant's track, it is urged by the defendant that the platform was not such as claimed by plaintiff, and, further, that the plaintiff entered upon the train at a place which was not usual for the passengers to get on or off of the cars. Therefore the court instructs the jury that you should ascertain from the evidence adduced before you upon the trial whether the company had desig' nated or set apart the mode and place for passengers to enter the cars. If so, then you will ascertain from the evidence if such rules and regulations were known to the plaintiff and whether or not he, in disregard *to* such requirements, entered the cars in another place and in so doing met with the injury, then the company would not be liable as a common carrier; but if, on the other hand, there was no such rules or regulations known to plaintiff and that he in good faith and using reasonable care was seeking to find and enter the cars and in so doing he by mistake got upon the platform of what is commonly known as the blind baggage, and if while on said platform the conductor of the train, while the train was moving, ordered and commanded plaintiff to get off and come down from said platform, and that plaintiff, relying upon the judgment of said conductor in giving of such order or command, made an effort to get off of said train, and, without any fault or negligence on the part of the plaintiff and by reason of the darkness of the night and of the negligence of the defendant in failing to light up its platform and in not stopping said train, and by reason of
76 the negligence of the defendant in the construction of its platform, plaintiff, in attempting to get off of said platform, as directed and ordered by said conductor, stepped off of said platform and fell under — and defendant's cars run over his foot and leg, crushing, bruising, and breaking the bones thereof, then the defendant would be liable and you ought to find for the plaintiff.

(Defendant, in the presence of the jury and before they had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Sixth.

As a general rule, railroad companies are bound to keep in a safe condition all portions of their platform and approaches thereto to which the public do or would naturally resort, and all portions of their station ground reasonably near to their platform where passengers or those who have purchased tickets with a view to take passage on their cars would naturally or ordinarily be likely to go.

(Defendant, in the presence of the jury and before they had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Seventh.

The court instructs the jury that if they find from the evidence that the plaintiff while on the platform of one of the defendant's cars was directed or ordered by the train conductor, the employee of the defendant, to get off of the train, then the plaintiff had the right to rely upon the said conductor's authority and discretion, provided the plaintiff, in his effort to obey said order and command, acted as an ordinary prudent man would act under like circumstances.

(Defendant, in the presence of the jury and before they had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Eighth.

The court instructs the jury that if the plaintiff took no more risk than an ordinary man would have taken under
77 like or same circumstances, then he was not guilty of contributory negligence.

(Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Ninth.

The court instructs the jury that if you find from the greater weight of the testimony that the plaintiff was directed or ordered by the defendant's train conductor or employee to get off of the train and such order or direction would cause an ordinary prudent man to believe he must obey or be subject to inconvenience, and that the plaintiff in attempting to comply with the directions or order of the train conductor, and while doing so he acted as an ordinarily prudent man would have acted, but was injured, then the defendant should be held liable for such injury.

(Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Tenth.

The court instructs the jury that it is the duty of the passenger to follow the reasonable directions given by the agent in charge of the railway train in respect to passing from one car to another while the same are in motion for the purpose of finding a seat, but if the passenger knows that the movement would be attended with danger it would not in such case be his duty to obey the conductor. On the other hand, a passenger may rightfully assume that the agents and servants of a railway carrier are familiar with the operation of the railway cars and have reasonable knowledge of what is required for safety and protection while giving such directions as an act of a passenger in obedience to the directions of the persons in charge of a train, such as the conductor, cannot be deemed negli-

gence on the part of the passenger unless so palpably opposed to common prudence as to make it a clear act of folly. The passenger has a right to assume that he will not be exposed to any unnecessary danger when following the directions of the persons in charge
78 of the running of said train, and in this case, if you believe from the preponderance of the evidence that the plaintiff Shane was a passenger upon the defendant's train, that he was unacquainted with the management and running of railway trains, and that by mistake he entered the said train upon the baggage car instead of the passenger coach, and that being discovered in that position by the conductor of the train by him was ordered to get off said train, and that plaintiff then notified said conductor that he was a passenger having a ticket, and that upon receipt of this information the conductor then directed him to get off of the baggage car and get on a passenger coach while the train was moving at a slow rate of speed, and the plaintiff in his effort to alight from the platform of said baggage car under the direction or order of said conductor he, the plaintiff, was injured, then you are told that unless the obeying of such direction or order of the conductor by the plaintiff was a clear act of folly on the part of the plaintiff, then the defendant is liable, and you should find for the plaintiff.

(Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to the last above mentioned charge of the court.)

Eleventh.

If the jury find for the plaintiff, they will assess his damages at a sum that will compensate him for the bodily injury he sustained, the pain he suffered from the effects of the injury on his health, if any, according to its degree and probable duration, and the pecuniary loss sustained by reason of inability to attend to his business occupation.

(Defendant, in the presence of the jury and before they had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Twelfth.

"You, gentlemen of the jury, are the sole judges of the testimony, and, applying the same to the law as given you by the court, you will render your verdict in this case."

(Defendant, in the presence of the jury and before they
79 had retired from the bar of the court, objects and excepts to the last above mentioned part of the court's charge.)

Which said charge was reduced to writing and read to the jury before argument of counsel for plaintiff and defendant.

Defendant, in the presence of the jury and before they had retired from the bar of the court, objects and excepts to the court reading at length as a part of its charge the plaintiff's complaint and defendant's answer and refer-ing the jury to such complaint and an-

swer for their only information as to what are the issues in this case to be tried by them.

Defendant, in the presence of the jury and before they had retired from the bar of the court, objects and excepts to that part of the court's charge to the jury which is as follows, to wit:

"The averments in the plaintiff's complaint and the denials in defendant's answer form the issue —, gentlemen of the jury, are to try."

Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to that part of the charge of the court to the jury which is as follows, to wit:

"That you have nothing to do on the question of the jurisdiction of the court in this case. The court having passed upon and held that it had jurisdiction, the jury must regard that question as settled."

Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to that part of the charge of the court in this case to the jury which is as follows, to wit:

"The court instructs the jury that in this case the burden of the proof is upon the plaintiff, and in order that he recover he must have established by a fair preponderance of the evidence all the material allegations in his complaint contained."

Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to that part of the court's charge to the jury in this case which is as follows, to wit:

80 "The court instructs the jury that the relation of carrier and passenger between a person traveling and the railroad company begins at the time such person enters upon the premises of such common carrier, and particularly does such relation begin when such person has purchased and paid for a ticket at the ticket office of said company for the purpose of taking passage on the train of such railroad company, and the relation continues until such passenger has reached and is discharged at the place of his destination."

Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to that part of the court's charge to the jury in this case which is as follows, to wit:

"Railroad companies are held to a strict accountability for the safety of passengers. To enable such companies to discharge this duty they have the power to make reasonable rules and regulations respecting the time, mode, and place of entering the cars, and these, when known to the passenger, he is bound to conform to."

Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to that part of the court's charge to the jury which is as follows, to wit:

"If a passenger is ignorant of the reasonable rules and regulations of a railway company respecting the time, mode, and place of

entering the cars, such passenger is not bound to conform to the same."

Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to that part of the charge of the court to the jury in this case which is as follows, to wit:

"A passenger may rightfully assume that the agents and servants of a railway carrier are familiar with the operation of the cars and have reasonable knowledge of what is required for safety and protection while giving such directions, and an act of a passenger in obedience to the directions of the persons in charge of the train, such as the conductor, cannot be deemed negligent on the
81 part of the passenger unless so palpably opposed to common prudence as to make it a clear act of folly."

Defendant, in the presence of the jury and before the jury had retired from the bar of the court, objects and excepts to that part of the court's charge to the jury in this case which is as follows, to wit:

"You, gentlemen of the jury, are the sole judges of the testimony, and, applying the same to the law as given you by the court, you will render your verdict in this case.

Thereupon the argument of counsel was made to the jury, and the jury then retired in custody of a bailiff to consider their verdict; and the jury, having duly returned into open court, returns a verdict finding in favor of plaintiff and against defendant damages in the sum of sixteen thousand dollars.

And thereupon the counsel for the defendant filed a motion for a new trial; which said motion is in words and figures as follows, to wit:

In the United States Court in the Indian Territory, Third Judicial Division, March Term, A. D. 1891.

J. H. SHANE
vs. } # 109.
GULF, COLORADO & SANTA FÉ RAILWAY COMPANY.

Motion for a New Trial.

Now comes the defendant in open court during the said March term, A. D. 1891, of said court and moves the court to grant a new trial in this cause for the following reasons, to wit:

1st. Because the court erred in refusing to allow the defendant's challenges for cause to jurors called in this cause.

2nd. Because the court erred in declining to furnish counsel in this cause with a list of eighteen competent jurors from which counsel might strike the names, not exceeding three on each side, of such jurors.

82 3rd. Because the court erred in admitting improper evidence offered by the plaintiff and objected to by the defendant.

4th. Because the court erred in refusing to admit proper evidence offered by defendant.

5th. Because the court erred in refusing to charge the jury as to the law as requested by the defendant.

6th. Because the court erred in charging the jury as to the law in this case as requested by the plaintiff.

7th. Because the court erred in charging the jury as to the law in this case on his own motion.

8th. Because the verdict of the jury is against the evidence.

9th. Because the verdict of the jury is against the weight of the evidence.

10th. Because the verdict of the jury is against the law.

11th. Because the verdict of the jury is against the law and the evidence.

S. E. JACKSON,
C. L. JACKSON,
Attorneys for Defendant.

Which said motion was by the court overruled, and to which action of the court the defendant then and there at the time duly excepted and still excepts.

And defendant thereupon filed a motion in arrest of judgment; which said motion is in words and figures as follows, to wit:

In the United States Court in the Indian Territory, Third Judicial Division, March Term, A. D. 1891.

J. H. SHANE
vs.
GULF, COLORADO & SANTA FÉ RAILWAY COMPANY. } #109.

Motion in Arrest of Judgment.

Now comes the defendant in open court, during the said March term, A. D. 1891, of said court, and, after the trial of this cause, still most respectfully maintaining that defendant's demurrer to
83 plaintiff's last amended complaint should properly have been sustained by this honorable court, *and* now moves the court to arrest the judgment in this cause because there is no cause of action in plaintiff's above-mentioned amended complaint.

S. E. JACKSON,
C. L. JACKSON,
Attorneys for Defendant.

Which said motion was by the court overruled, and to which action of the court the defendant then and there at the time duly excepted and still excepts.

And upon the overruling of said motion in arrest of judgment upon the application of defendant and by consent of all parties the court grants a stay of proceedings in this cause for a period of forty days from and after the 15th day of April, A. D. 1891; and it is further ordered by consent of all parties that defendant has leave

within such period of forty days and in vacation to tender and file its bill of exceptions in this case.

And now comes the said defendant, before the Honorable James M. Shackelford, judge of the above-entitled court, on the 11th May, A. D. 1891, and within the aforesaid period of forty days, and presents and tenders this its bill of exceptions, and prays that the same be allowed, signed, and sealed and made a part of the record in this cause, which is now accordingly done.

In witness whereof I, the undersigned, judge of the United States court in the Indian Territory, this 11th day of May, A. D. 1891, *I* have set my hand and affixed my seal in chambers.

JAMES M. SHACKELFORD. [SEAL.]
Judge of the United States Court in the Indian Territory.

We think the above a fair statement of this case.
May 8th, 1891.

W. M. CRAVENS.

84 Afterwards, on the 3rd day of June, A. D. 1891, in vacation, comes the defendant, by its attorney, and files its assignments of error; which said assignments of error *is* in words and figures as follows:

85 *Assignment of Error.*

In the United States Court in the Indian Territory, Third Judicial Division.

J. H. SHANE
vs.
GULF, COLORADO & SANTA FÉ RAILWAY COMPANY. } No. 109.

And now comes The Gulf, Colorado and Santa Fé Railway Company, by its attorneys, and says that in the foregoing record and proceedings there is manifest error, in this, to wit:

First. Said court erred in deciding that it had acquired jurisdiction over defendant in this cause.

Second. Said court erred in overruling defendant's motion to quash the writ of summons in this cause.

Third. Said court erred in refusing to furnish counsel with a list of eighteen qualified and competent jurors, as requested by defendant's attorneys, from which to make the peremptory challenges.

Fourth. Said court erred in its manner of selecting and empaneling the jury in this cause.

Fifth. Said court erred in refusing to allow defendant's challenge as to juror J. S. B. Apolos.

Sixth. Said court erred in permitting plaintiff to amend his complaint after the commencement of the trial.

Seventh. Said court erred in permitting the introduction of any testimony under the complaint in this cause.

Eighth. Said court erred in permitting witness Lum Johnson to

testify as to his measurements of the railway platform, made on April 10th, 1891, it appearing that the plaintiff had received the injuries complained of on July 11th, 1890.

86 Ninth. Said court erred in overruling defendant's motion to strike out the testimony of said Lum Johnson as to his measurements of the railway platform.

Tenth. Said court erred in permitting plaintiff, J. H. Shane, as a witness in his own behalf to testify as to what family and how many children he had.

Eleventh. Said court erred in permitting plaintiff, J. H. Shane, to testify as to what was his financial condition and what means, if any, besides his labor he had to support his family.

Twelfth. Said court erred in overruling defendant's motion to strike out all testimony of said plaintiff, Shane, in his own behalf as to his family consisting of a wife and two children and as to his being a poor man and unable to support his family.

Thirteenth. Said court erred in permitting said plaintiff, Shane, to testify in his own behalf as to how long it took the physicians to amputate his leg.

Fourteenth. Said court erred in permitting said plaintiff, Shane, to testify in his own behalf that there was a second operation performed upon, or amputation made of, plaintiff's leg.

Fifteenth. Said court erred in overruling defendant's motion to strike out and withdraw from the jury all testimony of said plaintiff, Shane, in his own behalf as to facts and circumstances showing negligence on the part of the physicians who treated said plaintiff and who operated upon his leg at the first and second amputations of the same.

Sixteenth. Said court erred in refusing to permit defendant's counsel to ask said plaintiff, Shane, on cross-examination, what his purpose was in going upon the platform of the baggage and express cars or blind baggage of the train instead of getting

87 upon the passenger cars of the train, defendant at the time offering to prove by such plaintiff upon cross-examination that his purpose in so going upon said blind baggage was an unlawful and improper purpose.

Seventeenth. Said court erred in refusing to permit defendant's counsel to ask said plaintiff, Shane, upon cross-examination, if he did not know that one Jack Edwards, who went upon the blind baggage of said train and who was with said plaintiff at the time plaintiff was injured, had been convicted of cattle stealing.

Eighteenth. Said court erred in refusing to permit defendant's counsel to ask said plaintiff, upon cross-examination, if it was not true and also known to plaintiff that said Jack Edwards was at such time charged with unlawfully introducing liquor into the Indian Territory, defendant at the same time offering to prove upon such cross-examination that said Jack Edwards, at the time plaintiff was so injured, was so charged with such crime of unlawfully introducing liquor into the Indian Territory, and that plaintiff went upon said blind baggage at the time he was so injured with the purpose of assisting said Jack Edwards in concealing himself

from officers of the law who wanted to arrest said Edwards for said crime; all of which the court declined to permit defendant's counsel to prove upon such cross-examination, and in so declining the court erred.

Nineteenth. Said court erred in declining to permit defendant's counsel to ask said plaintiff, Shane, upon cross-examination, if it was not his purpose in going upon said blind baggage at the time he was so injured to assist said Jack Edwards in concealing himself from such officers of the law as wanted to arrest said Edwards on the charge of unlawfully introducing liquor into the Indian Territory.

Twentieth. Said court erred in declining to permit defendant's counsel to ask said plaintiff, Shane, upon cross-examination, if he did not at his home in the Indian Territory, within a week prior to the day he received the injuries complained of, say to one Sam. Brown, a deputy United States marshal, that he, Shane, had helped to unlawfully bring liquor from Texas into the Indian Territory, defendant's counsel stating at the time that they expected to show upon such cross-examination that plaintiff was guilty of the crime of unlawfully introducing liquor into the Indian Territory, and that he went upon the blind baggage of said train at the time he received the injuries complained of for the purpose of concealing himself from officers of the law whom plaintiff believed were looking for him and were about to arrest him for such crime.

Twenty-first. Said court erred in declining to permit defendant's counsel to prove by said plaintiff upon such cross-examination that said plaintiff had concealed liquor in his house which had been unlawfully introduced by himself and others into the Indian Territory.

Twenty-second. Said court erred in declining to permit defendant's counsel to ask said plaintiff, Shane, upon cross-examination, if his purpose in going upon said blind baggage of said train at the time he was so injured was not to conceal himself from officers of the law whom he believed to be looking for him to arrest him on the charge of unlawfully introducing liquor into the Indian Territory.

Twenty-third. Said court erred in declining to permit defendant's counsel to ask said plaintiff, Shane, upon cross-examination, if the young man mentioned in the testimony as having been in company with said plaintiff and said Jack Edwards did not go back to the passenger coaches on said train and then return to the blind baggage where said plaintiff, Shane, and said Jack Edwards were and inform the two latter persons that there were no officers of the law on said train.

Twenty-fourth. Said court erred in refusing to permit defendant's counsel to prove by witness T. J. Starr that on several occasions just prior to the day upon which said plaintiff sustained the injuries complained of and in the immediate vicinity of where the plaintiff was upon the blind baggage defendant's passenger trains had been robbed by train robbers, which testimony was offered in

support of the theory that defendant's conductor when he discovered *that* the plaintiff and his companions upon the blind baggage was justified in believing they were there with an unlawful and improper purpose, and that under all the circumstances the conductor acted in a reasonable and proper manner in requiring the plaintiff and his companions to get off of said blind baggage.

Twenty-fifth. Said court erred in refusing to permit defendant's counsel to prove by witness J. C. Murphy, conductor of defendant's train upon which plaintiff received his injuries, that up to and just prior to the day upon which plaintiff received such injuries that said conductor had discovered a great many persons riding upon the blind baggage of his train and that such persons were always found to be tramps stealing '*stealing* a ride or persons with some unlawful and improper design upon such train or upon the persons or the property therein. Defendant's counsel at the time stated that they expected to follow up such testimony by further testimony as to the particular unlawful acts of such persons so found upon such blind baggage.

Twenty-sixth. Said court erred in refusing to permit defendant's — to prove by said witness Murphy that he was the conductor upon the train by which plaintiff received the injuries complained of and that such conductor was acquainted with the rules
90 and regulations of defendant railway company, and, further, that it was a rule of said railway company that all passengers shall enter its platform between the two day coaches and that the conductor and brakeman of that particular train were at such entrance and platform between such first and second class or day coaches when said train arrived at the station of Ardmore at the time plaintiff was injured for the purpose of assisting passengers off and on said train, in compliance with such rule, and actually did assist passengers in getting upon said train at said time, and, further, that said rule and regulation was reasonable and necessary for the safety of all passengers, and that said rule was well known and well published, and if plaintiff did not know of said rule it was alone due to his own carelessness and neglect.

Twenty-seventh. Said court erred in refusing to permit said defendant to prove by said witness, Murphy, that on several different occassions and within a very recent time prior to the day upon which the plaintiff was injured defendant's passenger trains leaving Ardmore for the south at about the same hour and running upon the same schedule time as the train by which the plaintiff was injured had been robbed and also attempted to be robbed by persons who had gotten on said blind-baggage platforms at the said station of Ardmore.

Twenty-eighth. Said court erred in permitting plaintiff's counsel, when plaintiff was recalled in rebuttal, to ask said plaintiff leading and suggestive questions and to examine him about matter which was not proper rebuttal.

Twenty-ninth. Said court erred in declining to direct the jury to return a verdict in favor of defendant, as was requested by the defendant at the close of the testimony.

Thirtieth. Said court erred in declining to charge the jury,
91 as requested by the defendant, that "a presumption of negligence on the part of the carrier is not raised on proof alone of the fact of a passenger being injured, and that it devolves upon the plaintiff to show some positive fact or circumstance showing actual negligence on the part of the carrier."

Thirty-first. Said court erred in declining to charge the jury, as requested by defendant, that "if they believe from the evidence that the plaintiff by his own negligence directly contributed in any degree to the injury sued for they will find for the defendant."

Thirty-second. Said court erred in declining to charge the jury, as requested by defendant, that "even though they should find from the evidence that plaintiff sustained the injuries complained of while he was endeavoring to follow the commands or directions of the conductor of defendant's train, yet if the jury find that the plaintiff might with the exercise of reasonable care have avoided the accident which occasioned the said injury, then you will find for the defendant."

Thirty-third. Said court erred in declining to charge the jury, as requested by defendant, that "if you find in this case that it is a matter of doubt from all the evidence whether the injury complained of by plaintiff can be attributed to any negligence on the part of the defendant or its agents or servants, then you will find for the defendant."

Thirty-fourth. Said court erred in declining to charge the jury, as requested by defendant, that "negligence consists in a want of reasonable care which would be exercised by a person of ordinary prudence, under all existing circumstances, in view of the probable danger of injury."

Thirty-fifth. Said court erred in declining to charge the jury, as
92 requested by defendant, that "even though you find that defendant or its agents and servants may have been guilty of negligence which resulted in plaintiff's sustaining the injury complained of in his complaint, yet if you further find that the plaintiff by his own negligent conduct caused or contributed to cause the injury received by him you will find for the defendant."

Thirty-sixth. Said court erred in declining to charge the jury, as requested by defendant, that "it was the duty of the defendant as a common carrier to provide a platform at its station at Ardmore, I. T., to be used by such persons as might have lawful occasion to use it, and that it was not necessary or required that said platform should be absolutely safe, but it was only necessary that such platform should be reasonably safe and sufficient for all persons using it who at the time of so using it exercised ordinary and reasonable care, and that if you find from all the evidence that the defendant had provided such a reasonably safe and sufficient platform at Ardmore station, and that plaintiff, even though he was hurt upon defendant's platform at the time he sustained the injuries complained of, might have avoided hurting himself by the exercise of reasonable and ordinary care, then you will find that the defendant

was not guilty of negligence in the manner of platform it at such time had provided at the depot in said town of Ardmore."

Thirty-seventh. Said court erred in declining to charge the jury, as requested by defendant, that "the defendant railway company was not bound to provide a depot platform brilliantly lighted for the use of its passengers, and that the only duty it owed in this respect to any passenger was to provide such lights on or about such platform as were necessary to render the use of the said platform and the passage over it to and from its train reasonably safe,
93 and in determining as to whether such platform at the time complained of by plaintiff was properly lighted you will take into consideration the darkness of the night and all other attending circumstances."

Thirty-eighth. Said court erred in declining to charge the jury, as requested by defendant, that "if they believe from the evidence that at the time mentioned in plaintiff's complaint the defendant railway company stopped the said passenger train at the depot in Ardmore a reasonable length of time to allow all passengers to get on said train, then it had discharged the obligation that it was under as a common carrier and was under no obligation to plaintiff to stop a second time at said Ardmore Station."

Thirty-ninth. Said court erred in declining to charge the jury, as requested by defendant, that "if the jury find from the evidence in this case that the plaintiff voluntarily got upon the railway train and upon the platform of the baggage or express car thereof when plaintiff might have entered within the regular passenger cars of defendant's said train and by entering upon said platform of said baggage or express car plaintiff occupied a more exposed position than he would have occupied in said regular passenger cars, and that by reason of his going upon said platform of said baggage or express cars the injury complained of by plaintiff was received by him, and that he would have not sustained such injury had he gone within such regular passenger cars, then you will find that plaintiff was guilty of such contributory negligence as will prevent his recovering in this case and you will find for the defendant."

Fortieth. Said court erred in declining to charge the jury, as requested by defendant, that "if you find from the evidence that the plaintiff did at the time mentioned in his complaint without
94 the consent of defendant go upon the platform of the baggage or express cars of defendant's train, and that such platform of such baggage or express car was not a place obviously intended for passengers on said train to ride upon, and that there was attached to and a part of such train regular passenger cars obviously intended for passengers to ride in, then the relation of passenger and carrier did not exist between plaintiff and defendant, even though plaintiff intended to pay regular fare for traveling upon said train over said railroad."

Forty-first. Said court erred in declining to charge the jury, as requested by defendant, that "if you find that the plaintiff went upon the platform of the baggage or express cars of defendant's *track* and when he might have gone upon or into the regular pas-

senger coaches and plaintiff was standing or sitting thereon, and that such platform of such baggage or express cars was obviously not intended for the use of passengers on a journey, and if by so doing the injury complained of by plaintiff was in part brought about, then you will find for the defendant."

Forty-second. Said court erred in reading at length as a part of its charge to the jury the plaintiff's complaint and the defendant's answer and referring the jury to such complaint and answer for their only information as to what the issues were in this cause to be tried by them.

Forty-third. Said court erred in its charge to the jury as contained in paragraph first of said charge.

Forty-fourth. Said court erred in its charge to the jury as contained in paragraph second of said charge.

Forty-fifth. Said court erred in its charge to the jury as contained in paragraph third of said charge.

95 Forty-sixth. Said court erred in its charge to the jury as contained in paragraph fourth of said charge.

Forty-seventh. Said court erred in its charge to the jury as contained in paragraph fifth of said charge.

Forty-eighth. Said court erred in its charge to the jury as contained in paragraph sixth of said charge.

Forty-ninth. Said court erred in its charge to the jury as contained in paragraph seventh of said charge.

Fiftieth. Said court erred in its charge to the jury as contained in paragraph eighth of said charge.

Fifty-first. Said court erred in its charge to the jury as contained in paragraph ninth of said charge.

Fifty-second. Said court erred in its charge to the jury as contained in paragraph tenth of said charge.

Fifty-third. Said court erred in its charge to the jury as contained in paragraph eleventh of said charge.

Fifty-fourth. Said court erred in its charge to the jury as contained in paragraph twelfth of said charge.

Fifty-fifth. Said court erred in that part of its charge to the jury which is as follows: "The averments in the plaintiff's complaint and the denials in the defendant's answer form the issue which you, gentlemen of the jury, are to try."

Fifty-sixth. Said court erred in that part of its charge to the jury which is as follows: "That you have nothing to do with the question of jurisdiction of the court in this case. The court having passed upon and held that it had jurisdiction, the jury must regard that question as settled."

96 Fifty-seventh. Said court erred in that part of its charge to the jury which is as follows: "The court instructs the jury that in this case the burden of the proof is upon the plaintiff, and in order that he recover he must have established by a fair preponderance of evidence all the material allegations in this complaint contained."

Fifty-eighth. Said court erred in that part of its charge to the jury which is as follows: "The court instructs the jury that the relation

of carrier and passenger between a person traveling and the railroad company begins at the time such person enters upon the premises of such common carrier, and particularly does such relation begin when such person has purchased and paid for a ticket at the ticket office of said company for the purpose of taking passage on the train of such railroad company, and the relation continues until such passenger has reached and is discharged at the place of his destination."

Fifty-ninth. Said court erred in that part of its charge to the jury which is as follows: "Railroad companies are held to a strict accountability for the safety of passengers. To enable such companies to discharge this duty they have the power to make reasonable rules and regulations respecting the time, mode, and place of entering the cars, and these, when known to the passenger, he is bound to conform to."

Sixtieth. Said court erred in that part of its charge to the jury which is as follows: "If a passenger is ignorant of the reasonable rules and regulations of a railroad company respecting the time, mode, and place of entering the cars, such a passenger is not bound to conform to the same."

Sixty-first. Said court erred in that part of its charge to the jury which is as follows: "A passenger may rightfully assume that the agent and servants of a railway carrier are familiar with the
97 operation of the cars and have reasonable knowledge of what is required for safety and protection while giving such directions, and an act of a passenger in obedience to the direction of the person in charge of the train, such as the conductor, cannot be deemed negligence on the part of the passenger unless so palpably opposed to common prudence as to make it a clear act of folly."

Sixty-second. Said court erred in that part of its charge to the jury which is as follows: "You, gentlemen of the jury, are the sole judges of the testimony, and, applying the same to the law as given you by the court, you will render your verdict in this case."

Sixty-third. Said court erred in overruling defendant's motion for a new trial.

Sixty-fourth. Said court erred in overruling defendant's motion in arrest of judgment.

Sixty-fifth. Said court erred in charging the jury as follows: "The court instructs the jury that in the present case to recover damages against the defendant as a common carrier for injuries caused, as alleged by the plaintiff, by the negligence and fault of the train conductor, also by the darkness of the night and the gross negligence of the defendant in failing to light up its platform and in not stopping its train and by reason of the gross negligence of the defendant in constructing its said platform about fifteen inches higher than the level of the road-bed *at* said road and in leaving a space of about eighteen inches between the curbing of said platform and the rail at said defendant's track, it is urged by the defendant that the platform was not such as claimed by plaintiff, and, further, that the plaintiff entered upon the train at a place which is not

usual for the passengers to get on or off the cars. Therefore
98 the court instructs the jury that you should ascertain from the evidence adduced before you upon the trial whether the company had designated or set apart the mode and place for passengers to enter the cars. If so, then you will ascertain from the evidence if such rules and regulations were known to the plaintiff and whether or not he, in disregard to such requirements, entered the cars in another place and in so doing met with the injury, then the company would not be liable as a common carrier; but if, on the other hand, there *was* no such rules or regulations known to plaintiff, and that he in good faith and using reasonable care was seeking to find and enter the cars and in so doing he by mistake got upon the platform of what is commonly known as the blind baggage, and if while on said platform the conductor of the train, while the train was moving, ordered and commanded plaintiff to get off and come down from said platform, and that the plaintiff, relying upon the judgment of said conductor in giving of such order or command, made an effort to get off of said train, and, without any fault or negligence on the part of the plaintiff and by reason of the darkness of the night and the negligence of the defendant in failing to light up its platform and in not stopping said train and by reason of the negligence of the defendant in construction of its platform, plaintiff, in attempting to get off of said platform as directed and ordered by said conductor, stepped off of said platform and fell under and defendant's cars run over his foot and leg, crushing, bruising, and breaking the bones thereof, then the defendant would be liable and you ought to find for the plaintiff."

66th. The court erred in charging the jury as follows: "As a general rule, railroad companies are bound to keep in a safe condition all portions of their platform and approaches thereto to which
99 the public do or would naturally resort and all portions of their station grounds reasonably near to their platform where passengers or those who have purchased tickets with a view to take passage on their cars would naturally or ordinarily be likely to go."

67th. The court erred in charging the jury as follows: "The court instructs the jury that if they find from the evidence that the plaintiff while on the platform of one of the defendant's cars was directed or ordered by the train conductor, the employee of defendant, to get off of the train, then the plaintiff had the right to rely upon the said conductor's authority and discretion, provided the plaintiff in his effort to obey said order and command acted as an ordinar-y prudent man would act under like circumstances"

68th. The court erred in charging the jury as follows: "The court instructs the jury that if the plaintiff took no more risk than an ordinary man would have taken under like or same circumstances, then he was not guilty of contributory negligence."

69th. The court erred in charging the jury as follows: "The court instructs the jury that if you find from the greater weight of the testimony that the plaintiff was directed or ordered by defendant's train conductor or employee to get off of the train and such

order or direction would cause an ordinary prudent man to believe he must obey or be subject to inconvenience, and that the plaintiff in attempting to comply with the directions or order of the train conductor and while doing so he acted as — ordinarily prudent man would have acted, but was injured, then the defendant should be held liable for such injury."

70th. The court erred in charging the jury as follows: The court instructs the jury that it is the duty of the passenger to follow the reasonable directions given by the agent in charge of the railway train in respect to passing from one car to another
100 while the same are in motion for the purpose of finding a seat, but if the passenger knows that the movement would be attended with danger it would not in such case be his duty to obey the conductor. On the other hand, a passenger may rightfully assume that the agents and servants of a railway carrier are familiar with the operation of the railway cars and have reasonable knowledge of what is required for safety and protection while giving such directions, as an act of a passenger in obedience to the directions of the persons in charge of a train, such as the conductor, cannot be deemed negligence on the part of the passenger unless so palpably opposed to common prudence as to make it a clear act of folly. The passenger has a right to assume that he will not be exposed to any unnecessary danger when following the directions of the persons in charge of the running of said train, and in this case, if you believe from the preponderance of the evidence that the plaintiff Shane was a passenger upon the defendant's train, that he was unacquainted with the management and running of railway trains, and that by mistake he entered the said train upon the baggage car instead of the passenger coach, and that being discovered in that position by the conductor of the train by him was ordered to get off said train, and that the plaintiff then notified said conductor that he was a passenger, having a ticket, and that upon receipt of this information the conductor then directed him to get off of the baggage car and get on a passenger coach while the train was moving at a slow rate of speed, and the plaintiff in his effort to alight from the platform of said baggage car under the direction or order of said conductor he, the plaintiff, was injured, then you are told that unless the obeying of such direction or order of the conductor by the plaintiff was a clear
101 act of folly on the part of the plaintiff, then the defendant is liable and you should find for the plaintiff.

Wherefore and for divers other errors apparent on the face of the said record said Gulf, Colorado and Santa Fé Railway Company prays that the aforesaid proceedings be reversed.

S. E. JACKSON,
C. L. JACKSON, AND
J. W. TERRY,
Attorneys for Gulf, Colorado and Santa Fé Railway Company.

Afterwards, to wit, on the 5th day of June, A. D. 1891, in vacation, comes the defendant herein, by its attorney, and files its writ

of error herein; which said writ of error is duly allowed and signed and sealed by the Honorable James M. Shackelford, judge of this court, and at which time the following order was entered of record; which said order is in words and figures as follows, to wit:

102 J. H. SHANE, Plaintiff,
vs.
THE GULF, COLORADO & SANTA FÉ RAILWAY COMPANY, Defendants. } No. 109. June 5th, 1891.

Now, at this day, comes the defendant and files in this cause the original writ of error duly allowed by the Honorable James M. Shackelford, judge of the United States court in the Indian Territory, and duly signed by the Honorable William Nelson, clerk of this court, and sealed with the seal of this court, and said defendant also files and lodges in the office of the clerk of this court a true and correct copy of said original writ of error; which said copy is so lodged with such clerk for the said J. H. Shane, plaintiff in this cause and defendant in error, and which said copy is duly allowed and signed by Honorable James M. Shackelford, judge of the United States court in the Indian Territory, and is also duly signed by the clerk of this court and sealed with the seal of this court; and defendant also files the original citation in this cause, duly signed by the Honorable James M. Shackelford, judge of the United States court in the Indian Territory, and indorsed upon such said citation is an acknowledgement of service of the same having — duly accepted by William M. Cravens, attorney for said defendant in error, J. H. Shane. Defendant also files the bond of said defendant, as principal, and Charles C. Hemming, Reuben Hardy, and Leonidas P. Anderson, as sureties, as required by law.

The above-mentioned writ of error is in words and figures as follows:

103 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the United States court in the Indian Territory in and for the third judicial division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgement in cause number 109, which is in the said United States court in the Indian Territory, before you, between J. H. Shane, as plaintiff, and The Gulf, Colorado and Santa Fé Railway Company, as defendant, a manifest error hath happened, to the great damage of the said Gulf, Colorado and Santa Fé Railway Company, as by its complaint appears, we, being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in

said Supreme Court of the United States, at Washington, within thirty days from this date, that, the record and proceedings being inspected, said Supreme Court of the United States may cause further to be done therein to correct that error what of right and in accordance with the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 5th day of June, A. D. 1891.

[SEAL.] WM. NELSON,
Clerk of the United States Court in the Indian Territory.

104 Allowed by—
JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

Endorsed: Filed Jun- 5, 1891. Wm. Nelson, clerk.

And said citation is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

To J. H. Shane, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, District of Columbia, United States of America, within thirty days from this date, pursuant to a writ of error filed in the clerk's office of the United States court in the Indian Territory, third judicial division, at Ardmore, wherein The Gulf, Colorado & Santa Fé Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why full and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 5th day of June, A. D. 1891.

JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

Service of the above citation is this 5th day of June, A. D. 1891, accepted, and any other or further service of same is hereby waived.

WM. M. CRAVENS,
Attorney for J. H. Shane, Defendant in Error.

105 Which said bond is in words and figures as follows:

UNITED STATES OF AMERICA, }
Indian Territory, Third Judicial Division, } *ss:*

United States Court in the Indian Territory, Third Judicial Division.

J. H. SHANE, Plaintiff,
vs.
THE GULF, COLORADO & SANTA FÉ RAILWAY COMPANY, Defendants.

Know all men by these presents that we, The Gulf, Colorado and Santa Fé Railway Company, as principal, and Charles C. Hemming, Reuben Hardy, and Leonidas P. Anderson, as sureties, are held and firmly bound unto J. H. Shane, his executors and administrators; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Gulf, Colorado & Santa Fé Railway Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the United States Court in the Indian Territory in and for the third judicial division of said territory:

Now, therefore, the condition of this obligation is such that
106 if *if* the above-named Gulf, Colorado & Santa Fé Railway Company shall prosecute its said writ of error to effect and answer all costs and damages if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Attest:

[SEAL.] JOHN M. BIRD, *Secretary.*

THE GULF, COLORADO & SANTA FÉ RAILWAY COMPANY,
By J. W. TERRY, *Solicitor for Texas.* [SEAL.]
CHAS. C. HEMMING. [SEAL.]
REUBEN HARDY. [SEAL.]
LEONIDAS P. ANDERSON. [SEAL.]

Approved by me this 5th day of June, A. D. 1891.

JAMES M. SHACKELFORD,
Judge U. S. Court.

Endorsed: No. —. U. S. court in I. T., third judicial division. J. H. Shane, plaintiff, *vs.* Gulf, Colorado & Santa Fé Railway Company. Bond. Filed Jun- 5, 1891. Wm. Nelson, clerk.

Afterwards, to wit, on the same day, defendant files a true and correct copy of the original writ of error in this cause; which said copy of said original writ of error is so lodged in the clerk's office

of this court for the defendant in error, J. H. Shane, and is duly allowed and signed by Honorable James M. Shackelford, judge of this court. Said copy of said original writ of error is in words & figures as follows, to wit:

107 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the United States court in the Indian Territory in and for the third judicial division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in cause No. 109, which is in the said United States court in the Indian Territory, before you, between J. H. Shane, plaintiff, and The Gulf, Colorado & Santa Fé Railway Company, defendants, a manifest error hath happened, to the great damage of the said Gulf, Colorado & Santa Fé Railway Company, as by its complaint appears, we, being willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court of the United States, at the city of Washington, within thirty days from this date, that, the record and proceedings being inspected, said Supreme Court of the United States may cause further to be done therein to correct that error what of right and in accordance with the laws and customs of the United States should be done.

[SEAL.] WM. NELSON,
Clerk of the United States Court in the Indian Territory.

Allowed by—
JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

108 And endorsed on said copy of said writ of error *is in* words and figures as follows, to wit:

This copy is lodged with the clerk of the United States court in the Indian Territory, third judicial division, at Ardmore, for the defendant in error.

C. L. JACKSON,
Attorney for The Gulf, Colorado & Santa Fé Railway Company, Plaintiff in Error.

Endorsed: "No. 109. J. H. Shane *vs.* Gulf, Colorado & Santa Fé Railway Company. Writ of error. Filed Jun- 5, 1891. Wm. Nelson, clerk."

Afterwards, to wit, on the same day, defendant files the original citation in this cause, duly signed by Honorable James M. Shackel-

ford, judge of the United States court in the Indian Territory, and endorsed upon said citation is an acknowledgement of service of the same having — duly accepted by William M. Cravens, attorney for said defendant in error, J. H. Shane.

Said citation is in words & figures as follows, to wit:

109 Said citation is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

To J. H. Shane, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, District of Columbia, United States of America, within thirty days from this date, pursuant to a writ of error filed in the clerk's office of the United States court in the Indian Territory, third judicial division, at Ardmore, wherein The Gulf, Colorado & Santa Fé Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and why full and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 5th day of June, A. D. 1891.

JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

Service of the above citation is this 5th day of June, A. D. 1891, accepted, and any other or further service of same is hereby waived.

WM. M. CRAVENS,
Attorney for J. H. Shane, Defendant in Error.

Endorsed: — court. No. —. J. H. Shane *vs.* Gulf, Colorado & Santa Fé Railway Company, defendants. Citation. Filed Jun- 5, 1891. Wm. Nelson, clerk.

And on the 30 day of June, A. D. 1891, the following further order was filed in said cause:

110 UNITED STATES OF AMERICA, } *ss:*
Indian Territory, Third Judicial Division, }

In the United States Court in the Indian Territory, Third Judicial Division. At Chambers.

THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY, Plaintiff in Error,
against
J. H. SHANE.

It now appearing to the undersigned, judge of the United States court in the Indian Territory, who signed the citation in this cause, that good cause has been shown therefor, and said time for the filing of the record of this cause with the clerk of the Supreme Court

of the United States not having yet expired, it is accordingly ordered that the time within which the record in the above-entitled cause may be filed with the clerk of the Supreme Court of the United States, as provided by rule nine of the rules of such Supreme Court of the United States, shall be, and the same is hereby, enlarged five days, so that the said record may be filed with
111 the said clerk of the Supreme Court of the United States within thirty-five days from the day of the issuing of the writ of error and signing of the citation in the above-entitled cause.

In witness whereof I have hereunto, at chambers, this thirtieth day of June, A. D. 1891, set my hand.

JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

112 UNITED STATES OF AMERICA, }
Indian Territory, Third Judicial Division, } *ss:*

In the United States Court in the Indian Territory, Third Judicial Division.

I, William Nelson, clerk of the United States court in the Indian Territory in and for the third judicial division of said Territory, do hereby certify that the foregoing is a true and correct copy of the records and proceedings and all things concerning the cause of J. H. Shane, plaintiff, against The Gulf, Colorado and Santa Fé Railway Company, defendant, as the same appear of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Ardmore, Indian Territory, this 30th day of June, A. D. 1891.

[Seal United States Court in the Indian Territory, Third Division.]

WM. NELSON,
Clerk of the United States Court in the Indian Territory.

113 [Endorsed:] No. —. In the Supreme Court of the United States. The Gulf, Colorado & Santa Fé Railway Company, plaintiff in error, *vs.* J. H. Shane, defendant in error. On writ of error from the third judicial division of the Indian Territory. J. W. Terry, S. E. Jackson, and Clifford L. Jackson, att'ys for plaintiff in error. Campbell & Jenkins and Wm. M. Cravens, attorneys for def't in error.

114 UNITED STATES OF AMERICA, *ss:*

To J. H. Shane, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, District of Columbia, United States of America, within thirty days from this date, pursuant to a writ of error filed in the clerk's office of the

United States court in the Indian Territory, third judicial division, at Ardmore, wherein The Gulf, Colorado and Santa Fé Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and why full and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 5 day of June, A. D. 1891.

JAMES M. SHACKELFORD,
Judge of the United States Court in the Indian Territory.

Service of the above citation is this 5th day of June, A. D. 1891, accepted, and any other or further service of same is hereby waived.

WM. M. CRAVENS,
Attorney for J. H. Shane, Defendant in Error.

115 [Endorsed:] — court. No. —. J. H. Shane, plaintiff, *vs.* Gulf, Colorado and Santa Fé Railway Company, defendants. Citation. Filed Jun- 5, 1891. Wm. Nelson, clerk. C. L. Jackson, att'y for defendant.

116 UNITED STATES OF AMERICA, } *ss:*
Indian Territory, Third Judicial Division, }

United States Court in the Indian Territory, Third Judicial Division

J. H. SHANE, Plaintiff,
vs.
THE GULF, COLORADO & SANTA FÉ RAILWAY COMPANY, Defendants. } Bond.

Know all men by these presents that we, The Gulf, Colorado and Santa Fé Railway Company, as principal, and Charles C. Hemming, Reuben Hardy, and Leonidas P. Anderson, as sureties, are held and firmly bound unto J. H. Shane in the full and just sum of twenty thousand dollars, to be paid to the said J. H. Shane, his executors and administrators; to which payment, well and *duly* to be made, we bind ourselves, jointly and severally, and our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named Gulf, Colorado and Santa Fé Railway Company hath prosecuted a writ of error in the Supreme
117 Court of the United States to reverse the judgment rendered in the above-entitled action by the United States court in the Indian Territory in and for the third judicial division of said Territory:

Now, therefore, the condition of this obligation is such that if the above-named Gulf, Colorado and Santa Fé Railway Company shall prosecute its said writ of error to effect and answer all costs and dam-

ages if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY,
By J. W. TERRY, *Solicitor for Texas.*
CHARLES C. HEMMING. [SEAL.]
REUBEN HARDY. [SEAL.]
LEONIDAS P. ANDERSON. [SEAL.]

Attest: JOHN A. BRENT, *Secretary.*

Approved by me this 5th day of June, A. D. 1891.
JAMES M. SHACKLEFORD,
Judge U. S. Court.

118 INDIAN TERRITORY, }
Third Judicial Division. }

I, William Nelson, clerk of the United States court in the Indian Territory, do hereby certify the above and foregoing to be a full, true, and complete copy of the appeal bond filed in my office for said third division, at Ardmore, on the 5th day of June, 1891, as the same appears from the files in my office.

Seal United States Court in the Indian Territory, Third Division.

Witness my hand and the seal of said court, at Ardmore, this 27th day of July, A. D. 1891.

WM. NELSON, *Clerk.*
By A. D. MATTHEWS.

119 [Endorsed:] No. 109. United States court in the Indian Territory, third judicial division. J. H. Shane *vs.* The Gulf, Colorado and Santa Fé Railway Company. Bond. Filed June 5, 1891. Wm. Nelson, clerk.

[Endorsed:] Sup. Court U. S., Oct'r term, 1891. No. 1249. The Gulf, Colorado & Santa Fé Railway Co., pl'ff in error, *vs.* J. H. Shane. Appeal bond.

[Stamped:] Office Supreme Court U. S. Filed Aug. 3, 1891. James H. McKenney, clerk.

Endorsed on cover: Case No. 14,723. Indian Territory United States court. No. 212. The Gulf, Colorado & Santa Fé Railway Company, plaintiff in error, *vs.* J. H. Shane. Filed July 6, 1891.

157-348

157-348

Office Supreme Court, U. S.
FILED.
JAN 29 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE GULF, COLORADO AND SANTA FÉ RAILWAY CO.,
PLAINTIFF IN ERROR,
v.
J. H. SHANE.

No. 212.

In Error to the United States Court for the Indian Territory.

BRIEF FOR PLAINTIFF IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
J. W. TERRY,
Att'ys for Plaintiff in Error.

GEO. R. PECK,
General Solicitor.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY, PLAINTIFF IN ERROR, v. J. H. SHANE.	*No.* 212.

In Error to the United States Court for the Indian Territory.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action brought by defendant in error to recover damages for personal injuries occasioned by the alleged wrong and negligence of the Railway Co. The original complaint was twice amended. The final complaint averred (R. 16):

1st. That plaintiff Shane was a citizen of the United States, and resident in the Chickasaw Nation.

2d. That the Railway Co. is a corporation of the State

of Texas, owning and operating a railroad, and was a common carrier of passengers for hire between Ardmore, in the Chickasaw Nation, and Gainesville, Texas, when—

3d. "Plaintiff alleges that on the 11th day of July, 1890, "he had purchased of the defendant's agent a ticket au- "thorizing him to travel as a passenger on the defendant's "railroad and cars from Ardmore, Indian Territory, to "Gainesville, in the State of Texas, and had gone on the "defendant's train as a passenger at the depot in the said "town *at* Ardmore, and said train had been put in motion "by the agents and servants of the defendant, when the "conductor in charge of said train ordered plaintiff to "get off said train and go thereon in another place; that "in obedience to command of defendant's conductor, and "relying on the judgment of said conductor in giving such "command, the plaintiff made an effort to get off said "train, and, without any fault or negligence of plaintiff, "and by reason of the darkness of the night and the gross "negligence of the defendant in failing to light up its "platform and in not stopping said train, and by reason "of the gross negligence of said defendant in constructing "its said platform about fifteen inches higher than the "level of the road-bed *at* said road, and in leaving a space "of about eighteen inches between the curbing of said "platform and the rail at said defendant's track, and the "improper and negligent conduct of defendant's conduc- "tor in ordering the plaintiff to get off the train while in "motion, plaintiff, in getting off said train as directed and "commanded by said conductor, stepped off said platform "and fell under, and defendant's cars ran over his left "foot and leg and crushed, bruised, and broke the bones "thereof.

"That by reason thereof the plaintiff became for a long "time ill; was obliged to and actually did expend about "the sum of — dollars for surgical and other treatment "and attendance in attempting to cure himself; was com- "pelled to have his leg amputated, and has thereby be- "come a cripple and prevented for life from actively pur- "suing his business and was otherwise injured to his

" damage in sum of twenty thousand ($20,000.00) dollars,
" for which and all other proper relief he prays judg-
" ment."

Thereto the Railway Co. answered (R. 17), and, saving all exceptions to the form of summons and defective service thereof theretofore made by special appearance—motion to quash and exception to its denial (R. 5–8)—denied all the averments of the complaint respecting the injury alleged, and further averred—

" that said conductor discovered the said plaintiff on the
" said train at a place thereon commonly known as the
" blind baggage, and where it was improper and danger-
" ous for any person to be, ordered the plaintiff to get off
" the platform of said baggage express car or cars of said
" train above mentioned as the blind baggage, and de-
" fendant states that thereupon said plaintiff got off said
" blind baggage or platform of said baggage or express
" car or cars." * * *

Upon trial, verdict and judgment were rendered for $16,000 (R. 20). Motions for new trial and in arrest of judgment were made and denied (R. 20, 21), whereupon this writ of error was allowed.

The bill of exceptions (R. 22–58) fully sets forth the proceedings in the trial of the cause, and the exceptions whereon the errors assigned therein are founded.

ASSIGNMENT OF ERRORS.

The errors assigned appear in the record (pp. 58–67) and will be grouped in the following—

ARGUMENT.

I.

SUMMONS DEFECTIVE AND RAILROAD COMPANY NOT WITHIN COURT'S JURISDICTION (Errors 1 and 2).

The summons (R. 4) neither shows the nature of the complaint, the cause of action, nor the relief sought. Hence defendant company moved to quash and excepted to denial of such motion (R. 5, 9).

"Although it is no longer necessary to state the cause "of action *in extenso* in the writ, it is still generally neces- "sary that the summons contain a summary statement of "the cause of action, and in jurisdictions where forms of "action have not been abolished it should specify the "form thereof."

Am. & Eng. Ency. of Law, Vol. 24, *Title Summons, p.* 517, *and cases cited.*

II.

SAID COURT ERRED IN REFUSING TO FURNISH COUNSEL WITH A LIST OF EIGHTEEN QUALIFIED AND COMPETENT JURORS, AS REQUESTED BY DEFENDANT'S ATTORNEYS, FROM WHICH TO MAKE THE PEREMPTORY CHALLENGES (Error No. 3).

SAID COURT ERRED IN ITS MANNER OF SELECTING AND EMPANELING THE JURY IN THIS CAUSE (Error No. 4).

The bill of exceptions recites (R. 23):

"Whereupon and before the jury was empaneled in this "cause, defendant's counsel requested the Court to cause "a list of eighteen competent and qualified jurors to be "made, and to furnish counsel for both parties with a copy

" of such list of eighteen qualified jurors from which coun-
" sel for each party might strike the names of three jurors,
" and from which said list the twelve jurors to try this
" cause should be selected, and that the jury to try this
" cause be selected in accordance with the statutes in such
" cases made and provided.

" The Court refused to grant such request of defendant's
" counsel for the reason that the rule had been established
" by the Court since its organization, that the exceptions
" should be taken to the twelve men that might be called
" into the box, and to which action of the Court in so re-
" fusing such request of defendant's counsel defendant
" then and there at the time duly excepted and still ex-
" cepts."

After the trial of the case at bar, the Circuit Court of Appeals 8th Circuit, in case of this *Railway Company* v. *James* (48 Fed. Rep. 148), in reviewing the *same* ruling made therein upon this point by the U. S. Court for the Indian Territory, held:

" When the case was called for trial, the counsel for the
" Railway Company, before the jury was impaneled, re-
" quested the Court 'to cause a list of eighteen competent
" ' and qualified jurors to be made, and to furnish counsel
" ' of both parties with a copy of such list, from which
" ' each party might strike the names of not exceeding
" ' three jurors, and from said list the twelve jurors to try
" ' this cause should be selected; and that the jury to try
" ' this cause be selected as is by the statute in such case
" ' made and provided.' This request was refused, to
" which exception was taken, and such refusal is duly as-
" signed as error. On May 2, 1890, Congress passed an
" act to enlarge the jurisdiction of the United States Court
" in the Indian Territory. In Section 31, certain general
" laws of the State of Arkansas as contained in Mansfield's
" Digest, published in 1884, are extended over the Terri-
" tory, and among these laws is mentioned Chapter 90,
" the provisions of which relate to the selection and sum-

" moning of jurors and drawing of a trial jury. Section " 4013 of this Digest enacts that 'if either party " ' shall desire a panel, the Court shall cause the " ' names of twenty-four competent jurors written upon " ' separate slips of paper to be placed in a box to be " ' kept for that purpose, from which the names of eighteen " ' shall be drawn and entered on a list in the order in " ' which they are drawn and numbered.' Section 4014 " provides that ' each party shall be furnished with a copy " ' of said list, from which each may strike the names of " ' three jurors, and return the list so struck to the Judge, " ' who shall strike from the original list the names so " ' stricken from the copies, and the first twelve names " ' remaining on said original list shall constitute the jury.' " Section 4015 provides, in substance, that before draw- " ing the list of 18 the Court shall decide all challenges " for cause which are presented, and, if there are not 24 " competent jurors, by-standers shall be summoned until " the requisite number of competent jurors is obtained, " from which said list shall be drawn. Under these sec- " tions parties are entitled to have 18 jurors on the list " before they are required to exercise the right of per- " emptory challenge. The denial of the request for a " panel, as provided by the statute, deprives the defend- " ant of a substantial right, and gave it a jury different " from that which the law provided. The defendant had " only 12 jurors when the statute gave it 18, from which it " could strike off three names. This requirement of the " statute that 18 jurors should be on the list, when parties " must make their peremptory challenges is mandatory, " and the Court cannot depart from the essential require- " ments of the law. (See Thomp. Trials, sec. 89; Thomp. " and M. Jur., secs. 267, 270, and authorities cited.) A " denial of this request by the Court, to which exception " was taken, is a fatal error."

The same Circuit Court of Appeals has since reaffirmed this decision in —

Railway Co. v. *Washington*, 49 Fed. Rep. 347;
Railway Co. v. *Childs*, ibid, 358;
Railway Co. v. *Martin*, ibid, 359.

III.

THE COURT ERRED IN PERMITTING PLAINTIFF TO AMEND HIS COMPLAINT AFTER THE COMMENCEMENT OF THE TRIAL (ERROR NO. 6).

The Bill of Exceptions recites (R. 23) that after both plaintiff and defendant's attorneys had opened the case to the jury, plaintiff's counsel asked and was *then* allowed to amend the complaint by inserting the words, "and the "improper and negligent conduct of defendant's conductor "in ordering the plaintiff to get off the train while in "motion." That to this amendment defendant's attorneys then objected and excepted because the amendment was new matter on which defendant had had no opportunity to prepare a defence.

The amendment was matter of substance and not form. It is manifest that it added new matter to the plaintiff's cause of action as alleged by his complaint, and left the defendant without any opportunity to prepare its defence thereto. If allowed at all it immediately entitled defendant to a continuance, which should have been granted.

Desty's Federal Procedure, p. 808, sec. 478, title *Continuance*, and cases cited.

IV.

ERROR IN ADMITTING TESTIMONY OF WITNESS LUM JOHNSON AS TO HIS MEASUREMENTS OF THE STATION PLATFORM MADE NINE MONTHS AFTER PLAINTIFF'S INJURY (NOS. 8 and 9).

This witness admitted, after stating the measurements made by him on April 10, 1891 (and during the trial), that—

" plaintiff; but, as nothing was said by it touching the evi-
" dence as to the ages of his children, they had the right
" to infer that the proof as to those matters was not with-
" drawn, and should not be ignored in the assessment of
" damages. For this error alone the judgment is reversed,
" and the cause remanded for a new trial."

In the case at bar the plaintiff, over the objection of defendant, was permitted to testify (Rec. 29), " I have never " been able to work since this accident;" again (Rec. 30), " I have a family consisting of my wife and two children." " I am a poor man, and have no means to support my " family without my labor."

The charge of the trial judge in no manner corrected the manifest error in admitting these statements. The jury must have taken them into consideration in awarding him a verdict for $16,000, and, under the decision *supra*, on this ground alone the judgment should be reversed.

VI.

Error in Permitting Plaintiff to Testify as to the Details of the First and Second Amputation of his Leg and Alleged Negligence of the Surgeons (Nos. 13, 14, 15, Rec. 59.)

This testimony appears at length in the record (pp. 30, 31) with defendant's exception thereto, based upon the substantial ground that all allegations as to these matters were held by the Court, on defendant's demurrer to the original complaint, to have been improperly alleged, and plaintiff given " leave to amend his complaint in that and " other respects, and in said amended complaint, upon " which this case is now being tried, there is no allega-" tion whatever charging or attempting to charge the

"defendant with the negligence of such physicians and "surgeons in the amputation of plaintiff's leg, or as to "the length of time in which such physicians were occu- "pied in so amputating plaintiff's leg," etc.

These matters were, hence, not in issue and formed no part of the pertinent *res gesta*. The admission of plaintiff's testimony hereon was error because it went to the jury as against defendant without correction by the Court and plainly tended to influence the jury in awarding damages. Upon the principle laid down in *Pennsylvania Co.* v. *Roy, supra*, it was erroneously admitted. This defendant was not liable for malpractice of the physicians and surgeons attending plaintiff for his injury, and his amended (and controlling) complaint does not even so suggest.

VII.

ERROR IN REFUSING TO PERMIT DEFENDANT'S COUNSEL TO CROSS-EXAMINE PLAINTIFF SHANE TO SHOW THAT HE WENT UPON THE "BLIND BAGGAGE" PLATFORM OF THE TRAIN WITH ONE EDWARDS FOR THE PURPOSE OF AVOIDING OBSERVATION, EACH FEARING ARREST FOR VIOLATION OF LAW IN INTRODUCING LIQUOR INTO THE INDIAN TERRITORY (Nos. 16, 17, 18, 19, 20, 21).

These matters appear at length in the bill of exceptions (R. 32–34). In substance the excluded questions were asked for the purpose of showing that both plaintiff and his companion, Edwards, had been engaged in unlawfully introducing and keeping liquor in the Indian Territory, and feared arrest therefor, and HENCE sought to avoid observation by *purposely* seeking to ride on the "blind baggage" platform—an unheard-of place to be deliberately chosen by any reasonable person entitled to a *seat* in

the passenger coaches and having a ticket therefor. In the same connection the Court (R. 34) sustained an objection to the question asked plaintiff by defendant's counsel " whether the young man mentioned in the testimony did " not leave witness and Jack Edwards on the said blind " baggage of said train and go back to the passenger " coaches on said train and then return to this witness and " Jack Edwards and tell witness and said Jack Edwards " that there were no officers on said train." On this ruling, error is also assigned (No. 24, R. 60).

This was manifest error. Defendant clearly had the right to show that plaintiff had a MOTIVE for seeking to ride on the " blind baggage " between the express and baggage cars, which led him thereto with all attendant danger and risk. That *fact* being proved would have been of great and necessary weight with any jury, and demonstrated at once that plaintiff's conduct and negligence was with deep design. It was equally competent to ask the witness whether the young man referred to had done as the question *supra* asked. The defendant had the right to an answer to this question. It was part of the *motive* alleged by defendant as being its purpose to show. If the plaintiff did seek to thus avoid observation and chose a place of danger—forbidden by both reason and universal custom—to effect *that* object, then this defendant was not liable for any injury which resulted to him therefrom.

VIII.

ERROR IN REFUSING TO ADMIT TESTIMONY TO SHOW THAT TRAMPS AND TRAIN-ROBBERS WERE FOUND CONCEALED ON THE "BLIND BAGGAGE," AND HENCE THE DEFENDANT'S CONDUCTOR WAS FOR THAT REASON ALSO JUSTIFIED IN REQUIRING PLAINTIFF TO REMOVE THEREFROM (Errors Nos. 24-25, 27, R. 60, 61).

The testimony thus offered and rejected is recited by the bill of exceptions (R. 35, 36, 39, 41). It was pertinent and material. Recent attempts to rob *this* train and passengers thereon by persons who concealed themselves thereon as did this plaintiff were causes of highest importance and would amply justify the conductor in acting with energy and promptness when persons were discovered in such improper and unusual places. The conductor was responsible for this train; it was under his control; robbery and attempted robbery had been committed by persons riding where plaintiff went upon this train. Ignorance of plaintiff was not known (nor justly to be imagined) by the conductor, and finding plaintiff there he had the right to immediately order him off.

IX.

PLAINTIFF'S KNOWLEDGE OF DEFENDANT'S RULES AND REGULATIONS AS TO ENTERING AND LEAVING PASSENGER TRAINS (Error No. 26).

Defendant offered (R. 40) to prove the rule of the company, as published and well known, that all passengers should enter its trains, upon the first and second-class coaches, at the platform between the coaches, and that the conductor and brakeman of *this* train were at that point

when the train arrived at Ardmore and plaintiff got on board. The Court refused to admit this testimony unless it were shown that plaintiff knew of such rule; whereupon counsel offered to prove that if plaintiff did not know of it he had ample opportunity to know it, and to further prove "that if he did not know of such rule it was "alone due to his own carelessness and neglect."

The testimony was excluded and exception taken. This was error. The plain offer was to show negligence on plaintiff's part in failing to learn of the rule. Why was not such testimony admissible? If one can readily and easily learn how to avoid danger and chooses not to so learn, can he charge another with the resulting injury to him? No case can be found to support such contention.

X.

Error in Improperly Admitting Evidence from Plaintiff not in Rebuttal (No. 28).

This appears in the record (p. 44). The error appears plain when the testimony objected to is read—and the leading character of the questions put is apparent.

XI.

Error in not Directing Jury to Return a Verdict for Defendant at the Close of the Testimony (Error No. 29).

Consideration of all the testimony clearly sustains this assignment. The testimony of the conductor is plain and direct. He swears (p. 38) that when he followed the boy back from the passenger coach to the blind baggage and found plaintiff and Edwards there, he ordered them off.

That *after* they got off "they informed me that they "had tickets. I told them that they had no business on "the blind baggage, and that they ought to know that "they ought to be in the passenger coaches. I then told "them not to get on again until I could stop the train for "them, and that I would stop the train for them. After "stopping the train, I went to see where plaintiff was, and "found him hanging on the south end of the first-class "passenger coach. I asked him what was the matter, "and he informed that his leg was broken, but he wanted "to get inside of the second-class coach to see his part-"ner."

Plaintiff's statement is (R. 28) that he got on the blind bagge platform, just as the train started, with Edwards; was ordered off by the conductor, and told to "get on here;" attempted to do so; stumbled on the car step or platform; hung on to an iron rod of the car that jerked him down, and was dragged for a few steps between car and platform, when he fell down, and the train ran over his left foot.

Plaintiff denied (R. 44) that conductor said "anything "about stopping train for us."

But here is the plain, direct statement of the conductor denied by the plaintiff. No further testimony is offered to corroborate the latter's denial. Edwards, plaintiff's companion, was not offered as a witness. The charge is made by the plaintiff; on him the burden of proof clearly rests. Yet the conductor swears positively that he told both plaintiff and Edwards to *wait* and he would stop the train for them. That was his duty; it must be presumed that he performed it. Plaintiff's unsupported statement *contra* is not sufficient to overcome the conductor's testimony. Without such preponderance of testimony his case necessarily fails, and defendant was clearly entitled to the verdict.

XII.

REFUSAL OF DEFENDANT'S PRAYERS FOR INSTRUCTIONS (Errors Nos. 30 to 41).

These were reasonable and correctly stated the law. *All* were refused by the Court without distinction and without assignment of any reason therefor.

They are too long to permit repetition here. As illustrative, we recite :

The Court was asked to charge (R. 45, Error 31, R. 62) that if the jury

"Believe from the evidence that the plaintiff by his own "negligence directly contributed in any degree to the in- "jury sued for, they will find for the defendant."

In *Redfield on Carriers and Bailees* (p. 271, sec. 356), it is said :

"To the liability of a Railway Company as passenger "carrier two things are requisite : that the Company shall "be guilty of some negligence, which mediately or imme- "diately produced or enhanced the injury, and that the "passenger should not have been guilty of any want of "ordinary care and prudence which directly contributed "to the injury ; since no one can recover for an injury of "which his own negligence was in whole or in part the "proximate cause."

The same rule is affirmed in *State* v. *B. & O. Ry* (24 Md. 84):

"The more approved statement of the doctrine of con- "tributory negligence is, that a person cannot recover for "an injury to which he contributed by his own want of "ordinary care."

Pierce on Railroads, 323.

That any reasonable man or a person of most ordinary sense or prudence would *choose* to enter upon a train by mounting the platform between the baggage and express cars, *i. e.*, the "blind baggage," passes belief. The facts here of record show the direct contrary.

Plaintiff swears (R. 32), "I purchased the ticket about "one-fourth of an hour before the arrival of the train." He therefore had abundance of time. The conductor testifies (R. 38), "My train stopped at Ardmore on the "morning of the 11th of July, 1890, about seven "minutes" (R. 39.) "I cannot state how many passen- "gers entered my train at Ardmore on that particular "night and train, but there is usually between 15 and 25 "enter this station every time I pass through, and there "were several passengers entered into the passenger "coaches on that particular night and train."

Plaintiff swears (R. 28): "As I was going up the steps "of the car the train started to move.

From these statements the following conclusions are manifest:

1*st*. The train stopped seven minutes and yet plaintiff did not attempt to get aboard until just as the train started out.

2*d*. Several passengers entered into the passenger coaches that night. *No one else was injured*. If plaintiff had boarded the train with these passengers (and he had then a first-class ticket (R. 29) purchased before the train arrived at Ardmore) in the ordinary and proper way, *he* would not have been injured. He waited until the last moment—got on where no man of even common sense would attempt to do so—and yet the Court refused to permit the jury by the instruction asked and refused to consider the plain rule of sense and of law, to wit, that if plaintiff's negligence was in whole or in part the cause

of his injury defendant was entitled to the verdict!

The other prayers for instructions were like well founded and were equally erroneously refused.

XIII.

Errors Assigned in Court's Charge (Nos. 42 to 70).

These are fully set forth in the Bill of Exceptions (R. 48–56). They are too long for repetition here. As illustrative, we suggest—

"The court charged the jury that if a passenger is "ignorant of the reasonable rules and regulations of a "railway company respecting the time, mode, and place "of entering the cars, such passenger is not bound to "conform to the same" (R. 51, 65).

Yet the court had refused the defendant's offer to show in this case that if plaintiff "did not know of such rule it "was alone due to his own carelessness and neglect" (R. 40) and left it to the jury to infer as a matter of law that ignorance would excuse this plaintiff in attempting to board this train at a point and place where no man of even most ordinary knowledge, reason, or sense would attempt to do so. The vice of such a charge is not open to extended comment. The proposition is too self-evident.

In *Railroad Co.* v. *Jones* (95 U. S. 439, 442) this Court said:

"One who by his negligence has brought an injury on "himself cannot recover damages for it. Such is the "rule of the civil and the common law. A plaintiff in "such cases is entitled to no relief. But where the de-"fendant has been guilty of negligence also, in the same "connection, the result depends upon the facts. The "question in such cases is, 1, Whether the damage was

" occasioned entirely by the negligence or improper con-
" duct of the defendant; or, 2. Whether the plaintiff him-
" self so far contributed to the misfortune by his own
" negligence or want of ordinary care and caution that
" but for *such* negligence or want of care and caution on
" his part the misfortune would not have happened.
" In the former case the plaintiff is entitled to recover.
" In the latter he is not." Citing many authorities.

Upon this plain and simple rule we confidently submit this branch of the case.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
J. W. TERRY,
Att'ys for Plaintiff in Error.

GEO. R. PECK,
General Solicitor.

157-348

157-346

Office Supreme Court, U. S.
FILED.
JAN 29 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894. No. 212.

THE GULF, &c., RAILWAY COMPANY,

Plaintiff in Error,

vs.

J. H. SHANE.

In Error to the United States Court for the Indian Territory.

BRIEF FOR DEFENDANT IN ERROR.

A. H. GARLAND and
WM. M. CRAVENS,
Attorneys for Appellee.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE GULF, &C., R'Y COMPANY,
Plaintiff in Error,

vs.

J. H. SHANE.

No. 212.

In Error to the United States Court for the Indian Territory.

BRIEF FOR DEFENDANT IN ERROR.

Counsel for the defendant in error having received the proof of the brief of the plaintiff at 3.30 p. m., on the 28th inst., proceeded at once, with all possible expedition, to reply to the same. The statement of the facts and the history of the case by plaintiff ~~is~~ are substantially correct for the purposes of this court, and we will not recapitulate in that behalf. Everything—motion, pleading, instruction, and all actions, gestures, and looks, possibly, of the defendant below and the trial court, were objected to by the plaintiff in error, and excepted to as well—from the original summons in the case to the rendition of the judgment therein, and the court will, no doubt,

be pleased to know that there are seventy assignments of error before it in this case. (Rec., 58–68.)

But, with all this claiming of errors, we must call the attention of the court to the fact, that this case does not belong here for review, but it should have gone to the proper Circuit Court of Appeals, under the act of March 3, 1891, establishing those courts. The court will observe that the joint resolution, after the passage of this act, does not affect the appellate jurisdiction given to those courts in that act, but merely specifies the time at which they must meet and organize.

The judgment in this case was rendered more than a month after the passage of this act, and the proper Circuit Court of Appeals then had jurisdiction of this writ of error, whenever that court should be organized, only some two months after this judgment. Certainly this court had been deprived of any such jurisdiction, if it ever had any.

Again, with the very extensive bill of exceptions that figures in this case, it nowhere appears in this Record that the whole of the testimony upon which the case was tried is set out or is brought before this court, and there is nothing in the Record to exclude the idea that there may have been other testimony to sustain this judgment. Merely stating that the plaintiff *rests* and the defendant *rests* does not meet the requirements of the rule of this court of long standing, and one to which it has adhered rigidly under all circumstances.

An effort, though not a very distinct one, was made in the court below, to question the jurisdiction of the court over this case as brought by the defendant in error, but we presume there is nothing of that question since the decision of this court in *McBride's Case, 141 U. S., 127*, and *Schumacher's Case, 152 Ib., 77*.

It is claimed that the summons in this case is defective; an exception is reserved to the judgment of the court in holding that it was sufficient. This summons (Rec., 4) seems to have all reasonable certainty about it as to the parties, cause of complaint, and time and place of appearance. Evidently it was sufficient to bring the defendant into court and to cause it to investigate what was the matter of complaint, and that would appear to be sufficient in any court of this day and time, for the United States courts especially are not running now upon the minute particularity of the writ of summons under the old common law. At all events the defendant mentioned in the summons came and saw, if it did not conquer, and there was no mistake; it knew who the plaintiff was, who the defendant was, and what the cause of action was. It moved to quash or to suppress this writ, but the motion was overruled; then and there if the company wanted to stand upon that question, it should have retired with grace and dignity from the contest, but it demurred and pleaded and answered and did everything else it could think of to avoid the just demand of the plaintiff in the action. Contesting the case upon its merits and its demerits as well, the company evidently appeared absolutely to the suit, and waived its objection to the summons and the service thereof, and there it must stand. The McBride and the Schumacher cases (*sup.*) established this, and many other authorities in the State courts and the Federal courts could be produced to show this; but Jones *v.* Andrews, 10 Wall., 329, places it beyond dispute, if any dispute could be raised upon such a question. This same principle announced in York *v.* Texas, 137 U. S., 15, although decided upon Texas statutes, is now the recognized principle in the courts of the United States.

The exception of the company to the empanneling of the jury is based upon a mistaken idea of the statute

cited to support it. It appears from the Record (p. 23) that the company asked for a list of eighteen competent and qualified jurors to be furnished counsel, &c., and the court refused this. The Statute of Arkansas, upon which this request is claimed to have been made, and which is claimed to be controlling here, was not complied with, because that statute evidently contemplated a panel of twenty-four to be placed in a box, and from that eighteen to be drawn; but here the request was simply to present counsel with a list of eighteen, and the Record does not show that any *desire* was expressed by either counsel for a panel—that is, a full list, as the statute requires. Therefore the cases cited by plaintiff in error do not reach this question; and in addition to this, the reason given by the court below why this request was refused is a sufficient response to this objection.

Exception is saved to the court's allowing an amendment to the complaint after the attorneys on both sides had opened the case to the jury. This, of course, in itself is a frivolous objection, as amendments now are considered within the discretion of the court at any time before the rendition of the verdict of the jury, and they are not reviewable in this court unless positive abuse of that discretion is shown.

Chapman *v.* Barney, 129 U. S., 677;
Bullit Co. *v.* Washer, 130 *Ib.*, 142;
Gormley *v.* Bunyan, 138 *Ib.*, 623.

The exception to Lum Johnson's testimony as to his measurement of the station platform, some time after the occurrence complained of, is not legitimate at all, because that went to the jury for just exactly what it was worth, and it was within the power of the railroad company to show the error in this measurement if any existed; and the fear or the apprehension expressed in the brief of

plaintiff in error that changes might have been made in the meantime in that platform, &c., are groundless, as the company might have easily shown this had it occurred; and it is submitted that the charge of the court (Rec., 48–56), in stating the relative duties and responsibilities of the company and the defendant in error, relieves this question of any difficulty before the jury.

The exception reserved as to the testimony admitted to prove how many children Mr. Shane had and his financial standing, etc., we think, is not tenable in this case, and the case differs very materially from the case of Roy, 102 U. S., 451, as the Record will show. This same point has been recently argued before this court in No. 152 of this term, and the case is now *cur. ad. vult*, and we beg leave to refer the court, without quoting from it (on account of the very limited time in which we have to make this brief), to the brief in that case on behalf of Pool.

But, it is with confidence submitted to the court, if there is any trouble on this point, the trial court removed it entirely by the eleventh instruction given to the jury (Rec., 54), which is as follows:

"*Eleventh.*

"If the jury find for the plaintiff, they will assess his damages at a sum that will compensate him for the bodily injury he sustained, the pain he suffered from the effects of the injury on his health, if any, according to its degree and probable duration, and the pecuniary loss sustained by reason of inability to attend to his business occupation."

And that this is the law, we think, is established by this court in several decisions of somewhat recent date, and it is not worth while to cite them here.

See 2 Greenl. Ev. (14th ed.), sec. 267 and notes, 268, 268a.

For the court will observe that this is not an action of *assumpsit* for the mere pecuniary loss, but is an action sounding in tort, in which the whole evil or malignant design is involved, and in which all damages resulting properly from the injury are to be estimated, and this distinction is recognized by all the authorities on this subject. And this is a sufficient answer to the exceptions saved to the testimony of plaintiff as to the amputations or surgical operations performed upon his leg.

In this case Shane was not on trial for any trespass or any offense that he may have committed in going to the "blind baggage platform," and what his motive was for going there is not material in this case. All under the law that this court may care to know as to Shane's conduct in this action is whether he contributed, by his negligence, to the taking place of the injury upon him; whatever he may have been himself, or with whomsoever he may have been associated, he was a passenger on that road by fair means, and was entitled to the protection of the road to his destination, and this is settled by the case of Roy, *sup.*, which plaintiff in error mistakingly applies here on its side, and by all the other cases decided by this court; and this disposes of a like objection reserved to the court's refusal to admit testimony to show that tramps and train robbers were found concealed on the "blind baggage," etc., and it is useless here to enter into a disquisition as to how remote, misleading, and confounding any such testimony would be in arriving at the true legal relations existing between this passenger and the railway company.

The objection to the scope of plaintiff's testimony in rebuttal (Rec., 44) is entirely begging the question. He was interrogated in explanation of matters he had stated in his examination in chief, and this, as a matter of course, was entirely proper.

The proposition that the court below erred in not directing this jury to return a verdict at the close of the testimony (assignment of error 29) in the face of this Record, might be said to be laughable in the extreme, because if there ever was a case before this or any other court, in which it was apparent, that the party complaining ought to recover, this is that case, the only question being how much he should recover, and that was purely a question for the jury. From the case of Railroad Co. *v.* Gladmon, 15 Wall., 401, down to the very last decided by this court, there is no pretense of authority favoring this proposition, claimed by plaintiff in error, and if a jury was not needed in this case none would ever be needed in another of a like character. If it could be dispensed with in this case at all, it should have been most unquestionably with directions from the court to find for plaintiff, under the opinion of Mr. Justice Harlan in the Union Pac. Ry. Co. *v.* McDonald, 152 U. S., 262.

It is not believed that it is worth while to take up the instructions asked by counsel of the railway company in the court below and discuss them. Doubtless some of them are good abstract law, but the court in its charge to the jury (Rec., 48–56), it is most respectfully submitted, gave the full and entire law on this subject to the jury. In fact, it almost quotes the law as given by this court and other courts on the main question involved here, and when that is done there is no error to complain of here, as this court has so often held. The testimony of the witnesses for plaintiff (Rec., 24–44), proves the matter up conclusively on the part of defendant in error, and that was before the jury under the charge of the court, and they were the judges of the fact, and they found the verdict for sixteen thousand dollars; and there is no direct and immediate complaint that it was excessive, and if there was it would be groundless,

because the testimony shows to any fair-minded man that Shane met with a cruel and merciless treatment at the hands of this company, and it is scarcely to be expected that this court will reverse the case, when under the law in another trial it must result just as this did, if not with higher damages.

The jury received the facts unmistakably; the court gave them the law of the case, and that should be, and must be, naturally and properly, the end of it.

A. H. Garland and
Wm. M. Cravens,
For Appellee.

January 29, 1895.

157-348

Office Supreme Court, U. S.
FILED.
JAN 29 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE GULF, COLORADO AND SANTA FÉ RAILWAY CO.,
PLAINTIFF IN ERROR,
v.
J. H. SHANE.

No. 212.

In Error to the United States Court for the Indian Territory.

Reply Brief for Plaintiff in Error.

A. T. BRITTON,
A. B. BROWNE,
J. W. TERRY,
Att'ys for Plaintiff in Error.

GEO. R. PECK,
General Solicitor.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

J. H. SHANE.

No. 212.

In Error to the United States Court for the Indian Territory.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The jurisdiction of this Court herein cannot be questioned. This writ of error was allowed and sealed on June 5, 1891 (R. 1). The Joint Resolution of March 3, 1891, supplementing the Act of that date creating the new Circuit Court of Appeals expressly provides (26 Stats., p. 1115):

"That nothing in said Act shall be held or construed in "anywise to impair the jurisdiction of the Supreme Court

" or any Circuit Court of the United States in any case
" now pending before it, or in respect of any case wherein
" the writ of error or the appeal shall have been sued out
" or taken to any of said Courts before the first day of
" July, anno Domini, eighteen hundred and ninety-one."

Wauton v. *De Wolf*, 142 U. S. 138.

II.

Whilst the point is not material, it is evident the Bill of Exceptions sets forth all the testimony given in the cause, and gives full statement of all testimony offered and rejected by the trial court.

III.

The request of plaintiff in error, with respect to empanneling the jury and the exception thereto, appears here in the *identical words* of the exception quoted by the Circuit Court of Appeals in *Railway Co.* v. *James* (48 Fed. Rep. 148), and repeated at length in our original brief, whereon that Court sustained the exception, and which ruling it thereafter affirmed in three other cases, which are also cited. If the identical exception and error assigned thereon is not here sustained, it is manifest this Court must overrule these repeated decisions of the Circuit Court of Appeals. We submit the point on the clear reasoning of those decisions.

IV.

The power of the trial court to permit the plaintiff to amend his declaration at a proper time and in a proper way is not denied. The error assigned is that such amendment was permitted *after* the case had been opened to the jury, and with respect to new and substantial matter

which the defendant was required to meet *instanter*. This was error and a case of "gross abuse of discretion," which this Court, in *Gormley* v. *Bunyan*, 138 U. S. 623, 631 (cited by opposing counsel), holds is here subject to review.

V.

The error of the Court in admitting testimony as to number of plaintiff's children—his financial condition, &c.—was *not* corrected by the charge. When admitted, over defendant's objection, the jury necessarily received it as *proper* testimony. The Court did not thereafter suggest to the jury that such testimony was incompetent or should be disregarded by them. Its general charge with respect to assessment of damages did not negative such testimony nor overcome the positive injury therefrom which the defendant suffered. In *Pennsylvania Co.* v. *Roy* (102 U. S. 451), cited in our original brief, the Court found that the effect of *part* of such erroneous evidence was cured, because the trial court, "*in a manner well calculated to attract* "*the attention of the jury*, withdrew from their considera- "tion the evidence in regard to the financial condition of "the plaintiff; but as nothing was *said by it* touching the "evidence as to the ages of his children, they had the "right to infer that the proof as to those matters was not "withdrawn, and should not be ignored in the assessment "of damages."

In the case at bar *nothing* was said by the Court in charging the jury to thus draw their special attention to this inadmissible evidence, and which would lead them to disregard it. The general charge cannot meet the requirement as made in the *Roy* case *supra*, nor cure the manifest error in admitting such evidence.

VI.

Notwithstanding counsel's assertion that "Shane was "not on trial for any trespass or any offence that he may "have committed in going to the 'blind baggage,'" we still insist the defendant had a right to show his motive for thus concealing himself. Shane had sought to testify that he chose this unusual and dangerous place from *ignorance;* we had a right to show that he did it with a different design and purpose, which, if established, would have *per se* destroyed all right on his part to hold the Company liable for his injury.

VII.

At the risk of again exciting the mirth of counsel, we still insist that the evidence justified a direction from the Court to the jury to return a verdict for defendant upon the grounds assigned in our original brief. And the citation by counsel of *Railway Co.* v. *McDonald*, 152 U. S. 262) against our contention is manifestly inapt unless his client was (as there) an infant and hence not responsible—a suggestion we do not find expressly indulged in his brief. Nor can the facts of the case cited find the faintest parallel in the case at bar. There the injury was occasioned by a burning slack pile left unguarded by the company and *hence* it was held liable for the infant's injuries. We *infer* counsel's contention to be that this company was likewise negligent in having baggage and express cars on this train between which (with a first-class ticket) plaintiff voluntarily sought to ride. If the company's conductor had allowed him to remain in his chosen post of danger, would counsel then admit his client had no cause of action arising from injuries received while thus engaged?

VIII.

The errors assigned in overruling defendant's prayers for instructions and in the charge of the Court, and the illustrations given therefrom by our original brief, are not answered by counsel. His comments do not merit reply.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
J. W. TERRY,
Att'ys for Plaintiff in Error.

GEO. R. PECK,
General Solicitor.

157-352

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

NO. 218.

HIRAM BARNEY, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ALEXANDER RICKARD AND NOAH LODER, EXECUTORS, ETC., OF ALEXANDER RICKARD, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 9, 1891.

(14729.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 218.

HIRAM BARNEY, LATE COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ALEXANDER RICKARD AND NOAH LODER, EXECUTORS, ETC., OF ALEXANDER RICKARD, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Summons	3	2
Marshal's return	4	2
Notice of appearance	5	2
Complaint	6	2
Plea	11	4
Bill of particulars	13	4
Order substituting executors as plaintiffs	20	7
Certificate of Surrogate's clerk	22	8
Minutes of trial	24	8
Judgment	25	9
Bill of exceptions	27	9
Statement of evidence	27	9
Testimony of Amos A. Smith	29	10
Treasury circular, March 20, 1863	30	10
Testimony of Gardiner S. Hawes	32	11
Frederick W. Brooks	39	14
Defendants' requests	50	19
Charge to jury	51	20
Judge's certificate to bill of exceptions	52	20
Assignment of errors	54	21
Joinder in error	56	21

1 UNITED STATES OF AMERICA, ss:

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Alexander Rickard and Noah Loder, executors, &c., of Alexander Rickard, deceased, plaintiffs, against Hiram Barney, defendant, a manifest error hath happened to the great damage of the said Hiram Barney, plaintiff in error, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part' aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the fifteenth day of June, eighteen hundred and ninety-one, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-one.

[SEAL.] JOHN A. SHIELDS,
Clerk.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 57, inclusive, contain a true and complete transcript of the records and proceedings had in said court, in the case of Hiram Barney, plaintiff in error, against Alexander Rickard and Noah Loder, executors, &c., of Alexander Rickard, deceased, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 13th day of June, in the year of our Lord, one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Indorsed:) O. S. 3014. U. S. Supreme Court. Hiram Barney, plaintiff in error, against Alexander Rickard et al., executors, &c., defendants in error. Writ of error. Edward Mitchell, U. S. attorney, attorney for

plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 19 day of May, 1891. D. C. Beatty, attorney for defendant in error. U. S. circuit court. Filed May 19, 1891. John A. Shields, clerk.

3 The President of the United States of America to the marshal of the southern district of New York, greeting:

We command you, that you take Hiram Barney, defendant, if he shall be found in your district, and him safely keep, so that you may have his body before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, to be held at the United States Court Building, number 41 Chambers street, in the city of New York, in the said southern district, on the 29th day of January, inst., to answer unto Alexander Rickard, plaintiff, in a plea of trespass; and also, to a certain bill of the said plaintiff's against the said defendant for the sum of fifteen thousand dollars, with interest, damages, according to the custom of the said court before the said judges, then and there to be exhibited, and that you have then there this writ.

4 Witness, the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New York, the 24th day of January, in the year one thousand eight hundred and sixty-six, and of the Independence of the United States the ninetieth.

KENNETH G. WHITE, *Clerk.*

A. W. GRISWOLD,
Pl'ff's Attorney.

(Endorsed:) U. S. circuit court, southern district of New York, Alexander Rickard vs. Hiram Barney. Capias ret, Jan. 29, 1866. A. W. Griswold, pl'ff's attorney. I hereby depute John Robinson to execute the within writ, dated Jan. 24, 1866. R. Murray, U. S. marshal. Filed Jan. 25, 1866.

5 U. S. circuit court.

HIRAM BARNEY *ads.* A. RICKARD. } Notice of appeara'ce.

SIR: You will please take notice that I am retained by and appear as attorney for Hiram Barney, the defendant in this action, and demand service of a bill of particulars of the plaintiff's claim herein, and a copy of his complaint upon me at my office in the U. S. court building, Nos. 41 & 43 Chambers st., in the city of New York.

Yours, &c.,

D. S. DICKINSON,
Attorney for Defendant.

To A. W. GRISWOLD, esq.,
Plaintiff's Attorney.

(Endorsed:) U. S. circuit court, Hiram Barney ads. A. Rickard. Notice of appearance. D. S. Dickinson, defendant's attorney. Rec'd Feb'y 17, '66. To A. W. Griswold, esq., pl'ff's att'y.

6 U. S. circuit court.

A. RICKARD
vs.
HIRAM BARNEY.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs come here into court and by A. W. Griswold, their attorney, complain of the defendant herein in a plea of trespass in the case.

For that whereas the said defendant on the 24th day of January, one thousand eight hundred and sixty-six, at the city of New York, in the southern district aforesaid, was indebted to the said plaintiffs in the sum of fifteen thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiffs to the said defendant, and at the special instance and request of said defendant.

And for money demanded and received of the plaintiff" by the
7 defendant as collector of customs for the port and district of New York, under color of a law of the United States providing for the collections of duties on imports. And for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards, to wit, on the same day and year, at *at* the place aforesaid, accounted together
8 with the said plaintiffs of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiffs in the further sum of fifteen thousand dollars of lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiffs, the said defendant in the consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) has not yet paid the said several sums of money above mentioned, or any or
9 either of them, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs the said defendant has hitherto wholly refused and still does refuse, to the damage of the said plaintiffs of fifteen thousand dollars, and thereof the plaintiffs being sent, &c.

A. W. GRISWOLD,
Attorney for Plaintiffs.

(Endorsed:) U. S. circuit court. A. Rickard vs. Hiram Barney. Declaration. A. W. Griswold, pltiffs. atty. Please take notice that on filing a declaration in this cause, with a copy whereof you are hereby served, a rule has been entered in the book of common rules kept in the office of the clerk of this court, at the city of New York, requiring the within-named defendant to plead to said declaration in twenty days after service of a copy thereof and notice of said rule or judgment on his
10 attorney. New York, 186—. A. W. Griswold, pltiffs. atty. Service of a copy of within and of the above notice is admitted. Dated Jan. 31, 1866. (Sgd.) D. S. Dickinson.

11 United States circuit court, southern district of New York.

HIRAM BARNEY
ads.
A. RICKARD. } Plea.

And the said defendant, Hiram Barney, by D. S. Dickinson, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form, as the said plaintiff in this suit has above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiff does the like, &c.

D. S. DICKINSON,
Defendant's Attorney.

To A. W. GRISWOLD, Esq.,
Plaintiffs' Attorney.

(Endorsed:) U. S. circuit court. Hiram Barney ads. A. Rickard. Plea. D. S. Dickinson, attorney for defendant. You will please
12 take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, Feb'y 10, 1866. Yours, &c., D. S. Dickinson, defendant's attorney. To A. W. Griswold, esq., plaintiffs' attorney.

13 United States circuit court, southern district of New York.

A. RICKARD
vs.
HIRAM BARNEY. } O. S. 3014.

SIR: The particulars of the plaintiffs' claim are for excess of duty paid under protest on worsted and worsted and cotton dress goods above thirty-five per cent, and for excess of fees paid for oaths to entries, stamps, and invoices and orders from one department of the custom to another on impor-

tations upon which such duties and fees were paid by plaintiffs to defendant, by the following vessels, viz:

[Name of importer, A. Rickard.]

		1861.
	Resolute,	Apl. 29
	Asia,	July 18
	Africa,	Aug. 1
	Fulton,	" "
	Bavaria,	" 14
14	Bavaria,	Aug. 15
	Persia,	" "
	Fulton,	" 16
	Arago,	Aug. 16
	Teutonic,	" 30
	Asia,	" "
	Bremen,	" 26
		1862.
	Bremen,	Jan. 9
	%N. Y.,	" 30
	Asia,	Feb. 15
	Teutonic,	Feb. 17
	Borussia,	Mch. 3
	Bremen,	"
	Hammonia,	"
	Africa,	" 14
	Wieland,	" 19
	Hausa,	" 25
	Saxonia,	" 28
	Asia,	Apl.
	Persia,	" 24
	Hausa,	"
	Persia,	June 6
	Trumbull,	" 10
	A. M. Lawrence,	"
	China,	" 19
	Etna,	" 24
	Bremen,	"
15	Scotia,	July 18
	Kangaroo,	" 19
	Borussia,	" 24
	New York,	" 24
	Persia,	" 26
	Saxonia,	" 29
	%Manchester,	Aug. 8
	Scotia,	" 12
	Fara,	" 27
	Hausa,	" "
		1863
	Scotia,	June 19
	China,	July 9
	%Washington,	" 13
	Persia,	" 16
	Olympus,	" 24
	Scotia,	" 28
	%Cork,	Aug. 7
	China,	" 12
	Sidon,	" 24
	New York,	Sept. 2
	Persia,	Aug. 27
	Scotia,	Sept. 9
	Hausa,	" 15
	%Manchester,	" 16
	China,	" 24
	America,	" 30
	Persia,	Oct. 8
	Bremen,	" 14

	1861.
Canada,	Aug. 23
Arago,	Sept. 3
Africa,	" 12
Persia,	" 27
Fulton,	Oct. 3
Asia,	Oct. 8
Bremen,	" 16
Teutonic,	" 26
Arago,	Oct. 30
Persia,	Nov. 6
Fulton,	" 27
Africa,	Dec. 9
	1862.
Hausa,	Aug. 25
Persia,	" 28
Bremen,	Sept. 3
Hammonia,	" 10
Australasian,	" 11
New York,	" 16
Scotia,	"
Persia,	Oct. 10
Hausa,	" 14
Bavaria,	" 15
Australasian,	" 25
Persia,	Nov. 20
New York,	" 13
Saxonia,	Dec. 6
Hausa,	" 17
Scotia,	" 29
Asia,	Jan'y 5
New York,	" 8
China,	" 15
Australasian,	Feb. 2
Bavaria,	Feb. 16
Africa,	Mch. 1
New York,	" 5
Teutonic,	Mch. 16
Saxonia,	" 27
Hausa,	Apl. 1
Bavaria,	" 13
Persia,	" 23
Australasian,	May 6
Persia,	June 3
	1864
%Baltimore,	Jan. 9
Africa,	" 12
New York,	" 13
Scotia,	" 15
Sidon,	" 16
%Limerick,	" 28
Australasian,	" 29
Germania,	Feb. 4
America,	" 3
Canada,	" 6
Edinburgh,	" "
China,	" 12
%Manchester,	" 20
Hecla,	" 25
Kangaroo,	" "
Hammonia,	" 26
Bremen,	Mch. 2
Australasian,	" 11

Scotia,	Oct. 22	Olympus,	ch. 24
New York,	" 28	China,	ch. 25
German ,	Nov. 4	Hausa,	" 18
Canada,	" 2	America,	" 28
China,	" 4	Persia,	Apl. 7
Hausa,	" 14	Sidon,	" 17
Scotia,	Dec. 4	Glasgow,	" 19
Bremen,	" 11	Australasian,	" 21
Australa ian.	" 19	Kedar,	May 31
Olympus	" 29	Asia,	" 28
%Manchester,	" 3	Australasian,	June 3
1864.			
Persia,	Jany. 4	Bremen,	" 9
Washington	June 29	Hecla,	July
Hecla,	July 2	%London,	Aug. 5
Scotia,	" 29	Borussia,	July 29
New York,	Aug. 3	Scotia,	Sept. 8
%Limerick,	" "	Hausa,	Aug. 15
Australasian,	" "	%Limerick,	" 20
Sidon,	" "	Bremen,	" 5
America,	July 18	New York,	" 29
Saxonia,	Aug. 13	Scotia,	July 29
Persia,	" 17	Olympus,	Aug.
Kedar,	" 22	China,	" 23
%Cork,	" 8	Germania,	Sept. 3
Kangaroo,	July 25		

E. & O. E.

16 Above intended to include all entries upon which duties and fees were paid by plaintiff to defendant between April 8th, 1861, and September 8th, 1864.

Yours, &c.,

A. W. GRISWOLD,
Plaintiff's Attorney.

To STEWART L. WOODFORD, Esq.,
U. S. Attorney for Defendant.

17 The following are the protests relied upon by plaintiff for a recovery of excess of duty paid on worsted and worsted and cotton dress goods above thirty-five per cent ad valorem, viz:

Name of vessel.	Date of protest.	No. of protest.
Persia	June 1, 1863	
Scotia	June 2, "	
China	July 3, "	
Persia	" 4, "	
%Washington	" " "	
Olympus	" 6, "	
Scotia	" 7, "	
%Cork	Aug. 8, "	
China	" 9, "	
Sidon	" 10, "	
Persia	" 11, "	
Scotia	Sept. 12, "	
Hausa	" 13, "	
%Manchester	" 14, "	
China	" 15, "	
America	" 16, "	
Persia	Oct. "	
Bremen	" 18, "	
Scotia	" 19, "	

	Name of vessel	Date of protest.	No. of protest.
	New York	Oct. 19, 1863	
18	Germania	Nov. 20, "	
	Hansa	" " "	
	Canada	" " "	
	%Manchester	Dec. 21, 1863	
	Bremen	"	
	Australasian	" 22	
	Olympus	"	
	%Manchester	Jan. 23, 1864	
	Africa	" 24, ?	
	New York	"	24
	Scotia	"	25
	Sidon	"	
	%Limerick	"	26
	America	Feb.	27
	Germania	"	28
	Edinburg	"	29
	"	"	30
	Canada	" ?	
	China	" 31	31
	Kangaroo	" 32	32
	Hecla	" 33	33
	Hammonia	" 34	34
	Bremen	Meh. 35	35
	Australasian	" 36	36
	China	" 37	37
	America	"	
	Hansa	" 38	38
	Persia	Apl.	39
19	Sedon	Apl.	40
	Australasian	"	41
	Glasgow	Apl. 1864	42
	Kedar	May	43
	Asia	" ?	
	Australasian	June	44
	Bremen	"	45
	Washington	"	
	China	" ?	

(Endorsed:) O. S. 3014. U. S. circuit court, south. dist. of New York. A. Rickard vs. Hiram Barney. Pl'ff's bill of particulars as amended. A. W. Griswold, pl'ff's atty. Due service of a copy of within amended bill of particulars is admitted, dated November 3rd, 1882. S. E. Woodford, U. S. atty.

20 United States circuit court, southern district of New York.

ALEXANDER RICKARD
vs.
ROBERT SCHELL ET AL., EXRS., &C., } O. S. 86.

ALEXANDER RICKARD
vs.
HIRAM BARNEY. } O. S. 3014.

On reading and filing the annexed certificate of the clerk of the surrogate's court of the county of Kings, State of New York, dated the 1st day

of December, in the year 1884, and the consent of the attorneys for the respective parties, it is

Ordered, that Alexander Rickard and Noah Loder, executors of the last will and testament of Alexander Rickard, deceased, the above-
21 named plaintiff, be substituted as plaintiffs in the above-entitled actions, in the place of said Alexander Rickard, deceased.

Dated Nov. 5th, 1886.

(Sgd.) ALFRED C. COXE.

We consent to the entry of the foregoing order.

Dated Nov. 5th, 1886.

ALMON W. GRISWOLD,
Pl'ff's Atty.
STEPHEN A. WALKER,
U. S. Atty. for Dfts.

22 STATE OF NEW YORK,
Surrogate's Court, County of Kings, ss:

I do hereby certify, that at the city of Brooklyn, in the county of Kings, on the sixteenth day of September, in the year of our Lord one thousand eight hundred and eighty-one, at a surrogate's court then and there held, before the surrogate of said county, letters testamentary on the last will and testament of Alexander Rickard, late of the city of Brooklyn, deceased, were duly granted and issued to Alexander Rickard and Noah Loder, and that the same are still valid and in full force.

In testimony whereof I have hereunto set my hand and affixed
23 the seal of the surrogate's court this 1st day of December, in the year 1884.

[L. S.] JUDAH B. VOORHEES,
Clerk of the Surrogate's Court.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Tuesday, the sixth day of May, in the year of our Lord one thousand eight hundred and ninety—

Present: The honorable E. Henry Lacombe, circuit judge.

ALEXANDER RICKARD AND NOAH LODER, EXECUTORS of Alexander Rickard, deceased.
vs.
HIRAM BARNEY.
} O. S. 3014.

Now come the plaintiffs, by A. W. Griswold, their attorney, and move the trial of this cause.

Likewise comes the defendant, by Thomas Greenwood, assistant U. S. attorney, his attorney.

Thereupon a jury is empannelled and the cause proceeds to trial.

After hearing the evidence of the parties, the argument of counsel, and the instructions of the court on Friday, May 9, 1890, the jury render a verdict for the plaintiffs for the sum of eleven hundred and ninety-nine dollars and ninety-nine cents.

It is ordered that a certificate of probable cause be entered herein, and that the defendant have a stay of proceedings of sixty days on said verdict.

An extract from the minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

25 This action having been commenced by capias in the U. S. circuit court for the southern district of New York, on the 29th day of January, 1866, and the defendant thereafter appeared, issue was joined on the 9th day of May, 1866.

And said cause came on for trial before a judge of this court and a jury on the 6th day of May, 1890, and on the 9th day of May, 1890, a verdict was duly rendered for the plaintiffs for the sum of eleven hundred and ninety-nine dollars and ninety-nine cents.

Now, on motion of Almon W. Griswold, plaintiff's attorney, it is ordered that Alexander Rickard and Noah Loder, executors of Alexander Rickard, plaintiffs, record against Hiram Barney, defendant, the sum
26 of twelve hundred and thirty-one & $\frac{39}{100}$ dollars, damages and interest, and seventy & $\frac{35}{100}$ dollars costs, amounting in the aggregate to the sum of thirteen hundred & one & $\frac{74}{100}$ dollars.

Judgment signed this sixteenth day of October, A. D. 1890.

JOHN A. SHIELDS,
Clerk.

(Endorsed:) O. S. 3014. U. S. circuit court, south. dist. of New York. Alexander Rickard vs. Hiram Barney. Judgment roll. A. W. Griswold, attorney for plaintiff. 11 Pine street, New York City. U. S. circuit court. Filed Oct. 16, 1890, 3 p. m. John A. Shields, clerk.

27 U. S. circuit court, southern district of New York.

ALEXANDER RICKARD ET AL, EXECUTORS OF Alexander Rickard, deceased, plffs., *against* HIRAM BARNEY, DEFT. } O. S. 3014.

Defendant's bill of exceptions.

Afterwards, to wit, on the 6th, 7th, 8th, and 9th days of May, 1890, at a stated term of this court, begun and holden on the first Monday of April, 1890, before the Hon. E. Henry Lacombe, circuit judge, the aforesaid issues, so joined as between the parties aforesaid, as by the record more fully appears, came on to be tried by a jury duly impanelled and sworn for that purpose, said plaintiffs being represented by Mr. Almon W. Griswold and Mr. W. Wickham Smith and said defendant by Mr. Edward Mitchell, U. S. attorney, and Mr. Thomas Greenwood, asst. U. S. attorney.

During the course of the trial said counsel for the respective parties did take and allege sundry exceptions to the rulings, instructions, charges, and directions of the court, and to its refusal to give certain directions and instructions to the jury as then and there prayed for by the respective parties.

To sustain the issues on their part, the plaintiffs introduced evi-
28 dence tending to show that during the year 1863 and 1864 the plaintiffs' testator made thirty-nine importations from France into

the port of New York of veil bareges, plain bareges, crepe maretz, grenadines, and merinos. All these goods, except the merinos, which were composed wholly of worsted, were composed of silk warp and worsted weft, and were entered at the custom-house in some instances by their respective names, or as silk and worsted.

These importations were classified for duty at the rate of 30 per centum ad valorem under the provision for "all stained, colored, or printed, and on all other manufactures of worsted, or of which worsted shall be a component material not otherwise provided for," contained in the third subdivision of section 13 of the act of March 2, 1861 (12 U. S. Stat., 178), as amended by the sixth subdivision of section 6 of the act of August 5, 1861, (12 U. S. Stat., 292), and for an additional duty at the rate of two cents per square yard as "manufacturers of worsted," or "of worsted and silk, silk not chief value," "similar to delaines, not exceeding in value 40 cents per square yard," under the provisions for "delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and all goods of similar description, not exceeding in value 40 cents per square yard," contained in section 9 of the act of July 14, 1862 (12 U. S. Stat., 543); and pursuant to such provisions, duty at the rate of 30 per centum ad valorem, and, in addition, of two cents per square yard, was exacted thereon
29 by the defendant as collector of the said port of New York.

Against the classification of these importations and the exaction thereon of thirty per centum duty and two cents per square yard, under the aforesaid section 9 of the act of 1862, the plaintiffs' testator protested, as contended by them on the trial, in accordance with the requirements of the 1st section of the act of February 26, 1845 (chapter 22, 5 U. S. Statutes, 727), claiming that these importations were not dutiable at the rate of 30 per centum ad valorem and two cents per square yard as goods of similar description to delaines, &c., but were dutiable instead thereof at the rate of thirty-five per centum ad valorem, under the provision for "all other manufactures of worsted, or of which worsted shall be a component material not otherwise provided for," contain' in *in* said section 9 of the said act of 1862.

The plaintiffs called Amos A. Smith as a witness, who testified that he was a custom-house broker, and that his firm of W. W. Thomas & Co. had made the entries at the custom-house for the plaintiffs' testator, and being shown the first of these entries and asked at what rate of duty the goods were entered, replied: "There is no rate stated; but that is a mere matter of figures."

Q. Will you explain to the court what that means?

A. The practice at the custom-house, where there is any uncertainty as to the correct rate of duty on any class of goods, is to take from the merchant what is known as the deposit. This deposit is intended to
30 cover, and to more than cover, the exact amount of duty. The exact duty not being known, or the collector not being able to get at the exact duty at the time of presentation of the entry, an amount is taken which is sufficient to cover, and more than cover, the duty, which amount is known as a deposit. This deposit is subject, of course, to final liquidation of the entry, based upon the appraisers' report.

Q. When was that entry finally liquidated?

A. June 22nd, 1863.

Q. Then the importer had no way of knowing what was the rate of duty to be exacted on his goods until the entry was liquidated?

A. That is correct.

The plaintiffs then offered in evidence the entries and invoices of the aforesaid thirty-nine importations and the protests of their testator relating to the same, and the same were received in evidence and marked, respectively, Exhibits 1 to 39, inclusive.

The plaintiffs then offered in evidence a certified copy of a Treasury circular dated March 20, 1863, and signed S. P. Chase, Secretary of the Treasury.

This circular was then admitted in evidence, and the following is a copy:

"MUSLIN DELAINES AND GOODS OF SIMILAR DESCRIPTION.

"TREASURY DEPARTMENT, *March* 20, 1863.

"SIR: On certain merchandise imported by Charles Stoddard and J. S. Lovering, and others, you assessed a duty of two cents per square
31 yard and thirty per cent ad valorem, under the clause in section 9 of the tariff act of July 14, 1862, which levies an additional duty of two cents per square yard, as follows:

"'On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goats' hair, and on all goods of similar description, not exceeding in value forty cents per square yard.'

"Messrs. Stoddard & Lovering claim that the goods in question should be assessed at the rate of thirty-five per cent ad valorem, as 'manufactures of mixed materials, not otherwise provided for;' other importers of like goods claim that the proper classification should be as 'other manufactures of worsted goods, or of which worsted shall be a component material, not otherwise provided for;' others, again, as 'manufactures not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool, etc.,' and 'that the goods in question are not "similar to delaines."'

"The clause of section 9 of the tariff act of July 14, 1862, above quoted, provides for every description of delaines, and 'whether dyed or printed, plain or twilled.' It says, 'on all delaines, etc.,' and on all goods of similar description, not exceeding in value forty cents per square yard.'

"The question now arises, what constitutes 'similar description?' I am of the opinion that all goods composed of the same materials and used for the same purpose as a 'delaine' must be treated as of 'simi-
32 lar description.' No line of demarcation can be drawn between one class of ladies' dress fabrics, composed of the materials named in the section quoted, and another that will ensure a satisfactory degree of uniformity throughout the country. In this opinion a majority of the experts of the customs, to whom the subject has been referred, agree.

"Your decision is hereby affirmed.

"I am, very respectfully,

"S. P. CHASE,
"*Secretary of the Treasury.*

"To J. Z. GOODRICH, Esq.,
"*Collector, &c., Boston, Mass.*"

The plaintiffs then produced as a witness in their behalf Gardiner S. Hawes, who being duly sworn, testified that from 1852 or 3 until 1880 odd he was interested in, and in 1863 became a partner in, the house of Charles Marlot & Co., which was engaged in the importation of French goods; that they imported principally cashmeres, merinos, mousseline delaines, veil bareges, plain bareges, crepe maretz in narrow widths, grenadines, and all sorts of fancy dress goods and silks; that as a merchant in 1861 he knew an article of merchandise like a sample shown him.

The sample shown him was known among merchants in 1861 as a barege for veils; was composed of silk chain and a tram of wool; that it was specially manufactured for veils and was used for veils; that he never had heard of its being used or seen it used for anything else but
33 veils; that he sold it for veiling; that its warp was of silk, more or less approaching one another, and the filling was of wool, more or less twisted according to the value; that it was not a strong structure; that the fineness of the barege with regard to the cost consisted in the closer approach of those silk threads which he said were very fine; that if there were more threads to the quarter inch the value would be, of course, greater; that if a lady should use it for a dress she would sit a hole in it to begin with, because it was too thin, and there was not strength enough in it to bear any pressure whatever; that the sample shown him was rather a poor quality and very wide goods; that his house imported goods like it, whether before 1861 or 1857 he could not tell, but he thought they did before that; that in 1861 they did have them, because it was in that period they introduced the dark browns and the very dark greens; that theretofore bareges had only been in two colors, a bright green and a blue; that a "voilette" was a detached veil made of silk, though of course it might be made of linen, or it might be silk and wool; that the reason it was called a voilette was because it was supposed to be half a veil, not a full veil, which was supposed to come away down; that goods like the sample shown here sometimes came made up in veils, and they had them in pretty square veils with a satin border on them made into shape and ready to put a string in.

The plaintiffs then offered this sample in evidence.

34 To its admission in evidence the defendants' counsel objected on the ground, 1st, that it was immaterial; 2d, that it was in no way connected with any goods in suit; and 3rd, that it was an article imported before 1861, and not between 1861 & 2.

These objections were overruled by the court, and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

This sample was then admitted in evidence and marked Exhibit 43.

The witness then testified that a sample shown him was known in this country in 1861 as a grenadine or a barege; that it was an ordinary barege, but not a barege for veils; had a chain of silk and a filling of wool; was then a well known article of merchandise in this country, and was imported by all the French houses of dress goods, including his house.

The plaintiffs then offered in evidence the sample.

To its admission in evidence the defendants' counsel made the same objections as just stated. These objections were overruled by the court and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

This sample was then admitted in evidence and marked Exhibit 44.

This witness then testified that a sample shown him was a barege, and might be called a grenadine sometimes; that it was a barege, but it was called a grenadine sometimes; that it was the same fabric as the
35 last sample, excepting a difference, for there was always some way in the loom of making a thing finer or coarser.

The plaintiffs then offered this sample in evidence.

To its admission in evidence the defendants' counsel made the same objections as just stated. These objections were overruled by the court, and to this ruling the defendants' counsel excepted, which exceptions were duly noted and allowed.

These samples were then admitted in evidence, attached to the last sample, and also marked Exhibit 44.

This witness testified that another sample shown him was a grenadine, what they called an iron barege, or an iron frame barege, which was generally very heavy in the chain and heavy in the tram; that was to say, the threads were twisted more and made harder; that one could feel that that has a more meshy touch, or a touch more like iron-framed barege; that it was composed of silk and wool, and was imported by his house; that he could not say by what name it was known in trade and among merchants in 1861; that he did not think it existed prior to 1861; that they did not make the iron-frame barege then, at least not to his knowledge; that his house imported it, or the same thing, in 1862 or 3; that the real name for it was in French canevas, because they resembled canvas; that when they came here they got the name of iron bareges; that it was not a species of grenadine; it was a grenadine, only it had a disposition of threads more or less heavy and harsh; that another
36 sample shown him was the same thing.

The plaintiffs then offered both of the last two mentioned samples in evidence.

To the admission in evidence of each of the same, the defendant's counsel made the same objections as just stated.

These objections were overruled by the court, and to this ruling the defendant's counsel excepted, which exception was duly noted and allowed.

This sample was then admitted in evidence and marked Exhibit 45.

The witness testified that Exhibit 43, which he had said was a veil barege made of silk and worsted, differed in no respect from veil bareges known in trade and commerce in this country in 1861, '2, '3, & '4; that sample Exhibit 44 did not differ at all from a plain barege, a silk and worsted barege as known in trade and commerce in 1861, '2, '3, and '4; it was simply a barege, that Exhibit 45 was a grenadine and in 1862, '3, and '4 was known in trade and commerce in this country as an iron barege, because of its superior strength, and the amount of silk put in the chain, and the amount of wool put in the tram, and by the twist of the thread; that it did not differ in any respect from what was known to trade and commerce in this country in 1862, '3, and '4 as grenadine.

On cross-examination the witness testified that he did not know anything about this suit; that he presumed he was brought into this suit as an expert witness; that Exhibit 43 veil barege was made of silk and
37 wool, of silk and worsted, he supposed; that he did not know what they called it at the custom-house; that as a practical man, as a

man of business from 1857, he would say that it was worsted, that his house never got the thing so very fine as that; that Exhibit 44 barege was made of silk and worsted; that he did not know anything about the bareges in this suit; that the general term of all that class of goods, represented by Exhibits 43 & 44, was "barege"; that there was another variety of bareges beside these; that there were different colors and different qualities, according as one ordered them; that Exhibit 43 veil barege represented the texture according to the price paid for them, of veil barege; that besides veil bareges there were bareges of that class that were made sufficiently strong for dress goods; that Exhibit 44 barege was not made for veils, but for dress goods; that Exhibit 45 grenadine was made of silk and wool, or silk or worsted; that it was a superior quality made on the same principle as a barege, only made heavier and stronger, or sufficiently strong to have entitled it when it got here to be called an iron-frame barege; that there was a great variety of grenadines; that he had seen them worth $1.50 per yard; that they would be heavier in proportion, a great deal heavier than either of these, Exhibit 45, and merchants would not generally pay for that quality of goods; that if a grenadine were of a quality worth 65 cents, it would not represent at all one which was worth $1.25; that Exhibit 45 was a fair sample of a fabric, according to the quality one wanted it; it was a sample of a grenadine of a
38 certain quality; that it was the same as a boy was a human being, only as he got older he was bigger; that he did not know anything about the grenadines in this suit, he did not know anything about this suit; that grenadines were used for dress goods, for ladies' goods; that he could draw a line of difference between a veil barege, and a barege used for dresses in price and quality; that veil bareges commenced with a quality worth about 18 or 13 cents per yard, running up to 60, that he got them as low as 75 centimes a metre, and he had them for over one franc; that counsel must not ask him how much these, Exhibit 43, were worth; he had been out of the trade too long, he did not remember; that in Exhibit 43 veil bareges what he called the chain, and others called the warp was very light, and amounted to nothing seemingly; that it gave away immediately, and the filling was not twisted much; it was just what one would want to cover the face with, to keep away the dust and not keep away the air, and, therefore, was made manifestly of qualities that were light, and that would be too light for a lady to sit down on; that he dealt in dress goods of a gauzy kind that were as thin as any of the bareges in evidence; that they were light goods, but they were proportionately strong in chain, and proportionately twisted in the frame; that he never heard of veil bareges being used and never saw them used for dresses; that bareges like Exhibit 44 were never used for veils, but these were made of finer quality, they did not obscure the view, and
39 some were much finer than that; that Exhibit 43 was of very poor quality, and no lady would have worn it; that one sample of Exhibit 45 was silk, that the other was worsted and silk.

This witness, on being recalled by the plaintiffs, testified that in 1862, '3, and '4 his firm, of Morlot & Co., dealt in an article known as crepe maretz; that it had a silk chain more or less twisted, according to quality, and the tram was manipulated in some way so that it spread the threads so as to give it an effect of crepe, or a crepe effect, although it was not a

crepe, as they called it on the other side. It did not go through the process that a real crepe did; but in the weaving of it they gave it a sort of a wavy effect for which they called it crepe; that crepe maretz would resemble Exhibit 43 (veil barges) somewhat, although it was much better defined.

Other witnesses were produced, but their testimony concerning the samples admitted in evidence did not differ from that of the witness Hawes; but no samples (of veil bareges, bareges, and grenadines), other than those above referred to as Exhibit 43, 44, and 45, were introduced in evidence by the plaintiffs.

The plaintiffs then produced as a witness in their behalf Frederick W. Brooks, who, being duly sworn, testified that he was for and many years past had been, a liquidator at the custom-house in the city of New York; that he had computed the excess with interest of duties claimed by the plaintiffs, under their protests to have been illegally exacted on the
40 goods in suit; that the principal sum of such duties exacted on merinos was $507.86; interest, $92.42; total, $1,400.28. That the principal sum of such duties exacted on plain bareges was $234.46; interest, $404.96; total, $639.42. That the principal sum of such duties exacted on veil bareges was $206.99; interest, $258.11; total, $565.10. That the principal sum of such duties exacted on grenadines was $54.42; interest, $93.52; total, $147.94. That the principal sum of such duties exacted on crepe maretz was $150.43; interest, $258.97; total, $409.40. That the principal sum of such duties exacted on crepes was $52.19; interest, $90.32; total, $142.51, making a grand total of $3,304.65.

It appeared that in case of the importation covered by Exhibit 7 at the time of the entry thereof, July 27, 1863, the plaintiffs' testator deposited with the defendant as collector of customs an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem; or in other words an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant as said collector retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation September 23, 1863; that the excess of the amount deposited with the defendant as said collector on July 27,
1863, over and above the amount of duties actually found due on
41 liquidation and retained as above, was refunded to the plaintiffs' testator September 25, 1863, that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to August 14, 1863; and that the protest relating to said importation was dated August 1, 1863, and endorsed August 3, 1863.

That in case of the importation covered by Exhibit 8, at the time of the entry thereof, July 31, 1863, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem, or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator

notified of such liquidation December 7th, 1863; that the excess of the amount deposited with the defendant, as said collector, on July 2, 1863, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator December 8, 1863; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to August 13, 1863; and that the protest relating to said importation was dated August 8, 1863, and endorsed August 11, 1863.

That in case of the importation covered by Exhibit 9, at the
42 time of the entry thereof, August 10, 1863, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate about of 40 per centum ad valorem, or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation November 7, 1863; that the excess of the amount deposited with the defendant, as said collector, on August 10, 1863, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator November 13, 1863; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to August 27, 1863; and that the protest relating to said importation was dated August 14, 1863, and endorsed August 15, 1863.

That in case of the importation covered by Exhibit 23, at the time of the entry thereof, January 14, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem, or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon
43 such ascertainment of liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation February 2, 1864; that the excess of the amount deposited with the defendant, as said collector, on January 14, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator April 13, 1874; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to January 23, 1864; and that the protest relating to said importation was dated January 15, 1864, and endorsed January 16, 1864.

That in case of the importation covered by Exhibit 24, at the time of the entry thereof, January 16, 1864, the plaintiffs' testator deposited with defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem, or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator

notified of such liquidation April 2, 1864; that the excess of the amount deposited with the defendant, as said collector, on January 16, 1864, over and above the amount of duties actually found due on liquidation and
44 retained as above, was refunded to the plaintiffs' testator April 5, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to February 4, 1864; and that the protest relating to said importation was dated January 21, 1864, and endorsed January 27, 1864.

That in case of the importation covered by Exhibit 25, at the time of the entry thereof, January 29, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem, or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation March 31, 1864; that the excess of the amount deposited with the defendant, as said collector, on January 29, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator, April 5, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to February 15, 1864; and that the protest relating to said importation was dated and endorsed February 11, 1864.

45 That in case of the importation covered by Exhibit 27, at the time of the entry thereof, February 6, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem, or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation February 19, 1864; that the excess of the amount deposited with the defendant, as said collector, on February 6, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator February 23, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to February 23, 1864; and that the protest relating to said importation was dated and endorsed February 11, 1864.

That in case of the importation covered by Exhibit 28, at the time of the entry 'hereof, February 15, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem, or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such
46 ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the

plaintiffs' testator notified of such liquidation May 26, 1864; that the excess of the amount deposited with the defendant, as said collector, on February 15, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator May 23, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to February 26, 1864; and that the protest relating to said importation was dated and endorsed March 4, 1864.

That in case of the importation covered by exhibit 31 at the time of the entry thereof, February 27, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem; or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated, and the plaintiffs' testator notified of such liquidation April 12, 1864; that the excess of the amount deposited with the defendant, as said collector,

47 on February 27, 1864, over and above the amount of duties actually found due on liquidation and retained as above was refunded to the plaintiffs' testator April 13, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to March 5, 1864; and that the protest relating to said importation was dated and endorsed March 14, 1864;

That in case of the importation covered by exhibit 32 at the time of the entry thereof, March 3, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem; or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated, and the plaintiffs' testator notified of such liquidation April 15, 1864; that the excess of the amount deposited with the defendant, as said collector, on March 3, 1864, over and above the amount of duties actually found due on liquidation and retained as above was refunded to the plaintiffs' testator April 18, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to March 16, 1864; and that the protest relating to said importation was dated and indorsed March 14, 1864;

48 That in case of the importation covered by exhibit 33 at the time of the entry thereof, March 12, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem; or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry. That upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated, and the plaintiffs' testator notified of such liquidation March 29,

1864; that the excess of the amount deposited with the defendant, as said collector, on March 12, 1864, over and above the amount of duties actually found due on liquidation and retained as above was refunded to the plaintiffs' testator April 5, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to March 25, 1864; and that the protest relating to said importation was dated and endorsed March 19, 1864;

That in case of the importation covered by exhibit 36 at the time of the entry thereof, March 29, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem; or, in other words, an amount in excess of the amount of
49 duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation May 2, 1864; that the excess of the amount deposited with the defendant, as said collector, on March 29, 1864, over and above the duties actually found due on liquidation and retained as above was refunded to the plaintiffs' testator May 2, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to April 12, 1864; that the protest relating to said importation was dated and endorsed April 1, 1864;

That in case of the importation covered by exhibit 38, at the time of the entry thereof, April 20, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon, at the rate of above 40 per centum ad valorem; or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation, the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation May 16, 1864; that the excess of the amount deposited with the defendant, as said collector, on April
50 20, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator May 19, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to April 30, 1864; and that the protest relating to said importation was dated May 3, 1864.

Both sides having rested the defendant's counsel moved the court to direct the jury to find for the defendant as to each of the importations covered by exhibits 7, 8, 9, 23, 24, 25, 27, 28, 31, 32, 33, 36, and 38, on the ground that the payment of the duties sought to be recovered in the case of each of said importations was paid on or about the respective dates of the entry thereof, and the respective protests against the exaction of such duties was not made until after such payments; or, in other words, was not made at or before such payment, as required by the aforesaid act of February 26, 1845.

This motion the court denied and to this ruling the defendant's counsel excepted, which exception was duly noted and allowed.

The defendant's counsel also moved the court to direct the jury to find for the defendant as to each of the importations covered by exhibits 7, 8, 9, 23, 25, 27, 28, 31, 32, 33, 36, 38, on the ground that if the date of the payment of the duties exacted thereon was not the date or about the date of the entry thereof, and was the date of the liquidation of such
51 duties and the notification to the plaintiff's testator of such liquidation, the plaintiffs' testator obtained possession of the goods embraced within such importations before such payment; or, in other words, did not pay the duties thereon to obtain such possession as required by said act of 1845.

This motion the court denied, and to this ruling the defendant's counsel excepted, which exception was duly noted and allowed.

The court then charged the jury.

(The following excerpt from the charge, though not itself excepted to, is inserted in the record as having a bearing upon the exceptions taken by the defendant to the admission of certain exhibits introduced by the plaintiffs.)

Much has been said, on both sides, in regard to the samples of plaintiff's goods. There are none produced here. I should have thought it rather extraordinary if, after the lapse of twenty-seven years, either side had preserved scraps of the particular bales of goods which came in by these vessels. There is no inference to be drawn for or against anybody, from the mere fact that, after this great lapse of time, scraps of the identical goods that came in by these thirty-nine vessels are not produced before you and separately identified. That fact makes nothing one way or the other. Under the circumstances the plaintiff has done the best he can; he has produced here certain samples which men in the trade state are samples which fairly represent goods that bore the same names, and of the same kinds of goods that he introduced, or that were named
52 in his invoices; although, as to all these samples (I think it is as to all of them), the witnesses agree that there were variations in quality and in grade, perhaps in the number of threads to the square inch, in the particular fineness or superiority of the materials used, and, of course, in color. With those variations (which, of course, you all recognize are common and familiar variations in different articles of trade), these samples are submitted to you on behalf of the plaintiff as being the best that he can do towards giving you fair samples of the goods which he imported. These, then, are to be compared with samples of the standard, in order to determine whether they are goods of a similar description to that standard.

The jury having retired and duly deliberated rendered a verdict for the plaintiffs as to veil baregés, grenadines, crepes, and crepe maretz, and in the sum of $1,199.99 dollars.

And, inasmuch as the defendant's said exceptions, matters, and things aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of the said defendant by his counsel, and it is ordered that the same be filed as a part of the record herein with like force and effect as if the same had been reduced to writing, signed, and filed before the case was given to the jury.

Witness my hand, at the city of New York, this 15th day of October, 1890.

E. HENRY LACOMBE.

53 (Endorsed:) O. S. 3014. U. S. circuit court, southern district of New York. Alexander Rickard et al., executors of Alexander Rickard, deceased, plffs., versus Hiram Barney, deft. Defendant's bill of exceptions. Edward Mitchell, United States attorney, attorney for defendant. U. S. circuit court. Filed Oct. 15, 1890. John A. Shields, clerk.

54 Supreme Court of the United States.

HIRAM BARNEY, PLAINTIFF IN ERROR,
vs.
ALEXANDER RICKARD AND NOAH LODER, executors, &c., of Alexander Rickard, deceased, defendants in error.
} Assignment of errors.

Afterwards, to wit, on the fifteenth day of June, 1891, before the justices of the said court, at the Capitol in Washington, come the said plaintiff in error, by Edward Mitchell, U. S. attorney, (his) attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

EDWARD MITCHELL,
U. S. Attorney and Attorney for Plaintiff in Error.

55 (Indorsed:) O. S. 3014. United States Supreme Court. Hiram Barney, plaintiff in error, vs. Alexander Rickard et al., executors, &c., defendants in error. Assignment of error. Edward Mitchell, U. S. attorney & attorney for plaintiff in error. U. S. circuit court. Filed May 19, 1891. John A. Shields, clerk. Due service of a copy of the within assignment of error is hereby admitted this 19th day of May, 1891. D. C. Beatty, attorney for defts. in error. To D. C. Beatty, attorney for defendants in error, 26 Court st., Brooklyn, N. Y.

56 Supreme Court of the United States.

HIRAM BARNEY, PLFF. IN ERROR,
vs.
ALEXANDER RICKARD AND NOAH LODER, EXRS. of Alexander Rickard, deceased, defts. in error.
} Joinder in error.

And afterwards, to wit, on the 15th day of June, in said term, the said defendant in error by D. C. Beatty, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.